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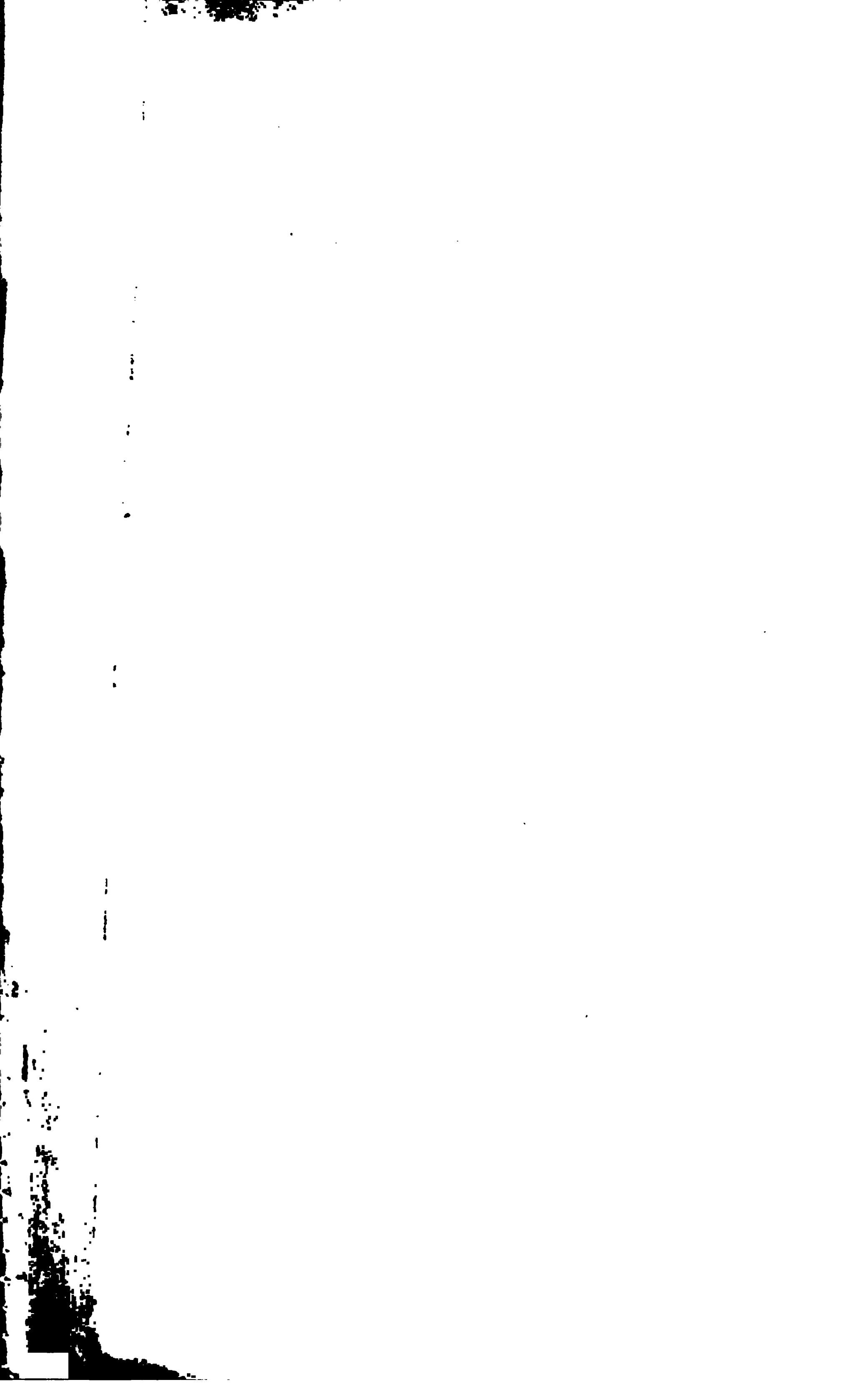
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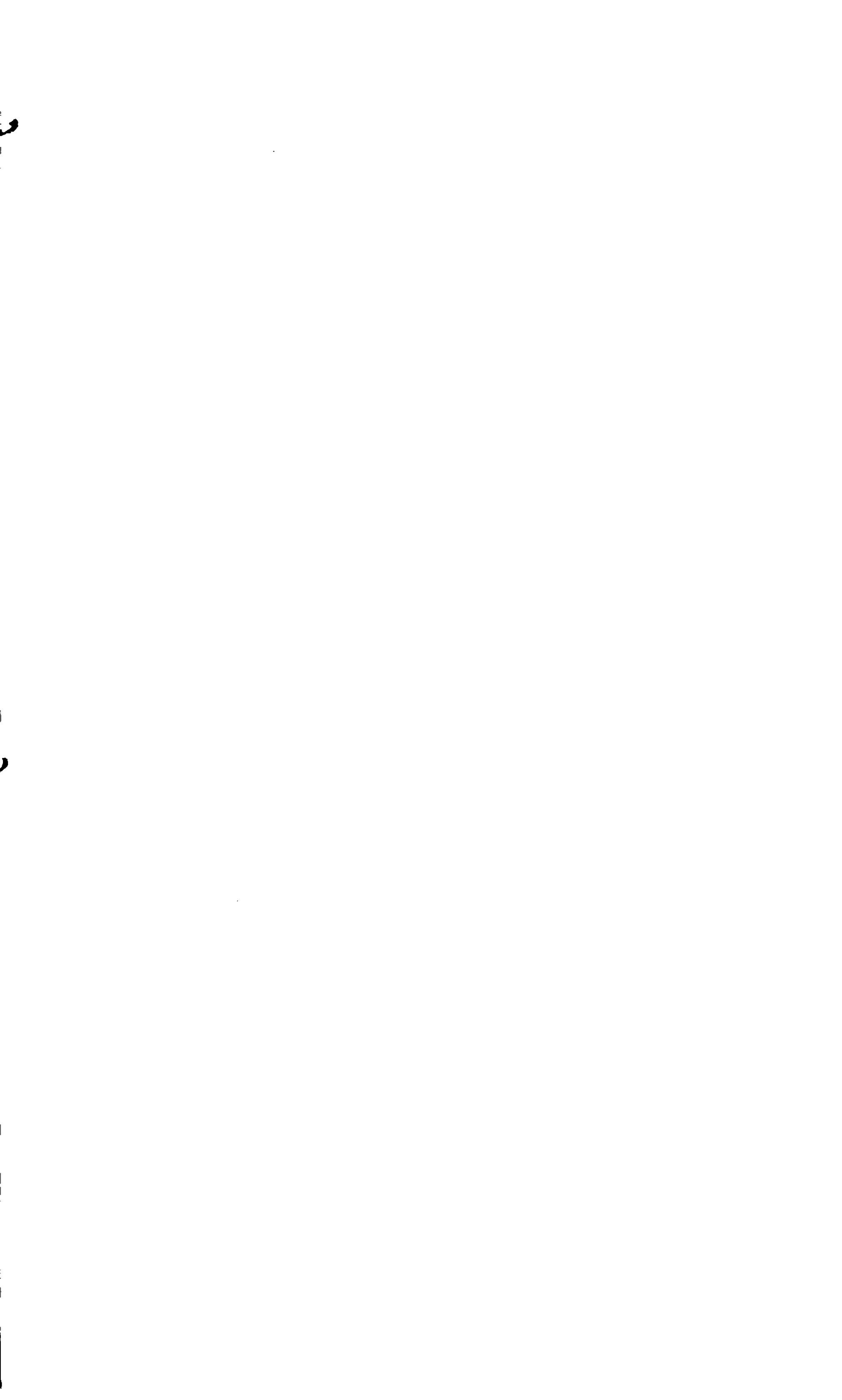
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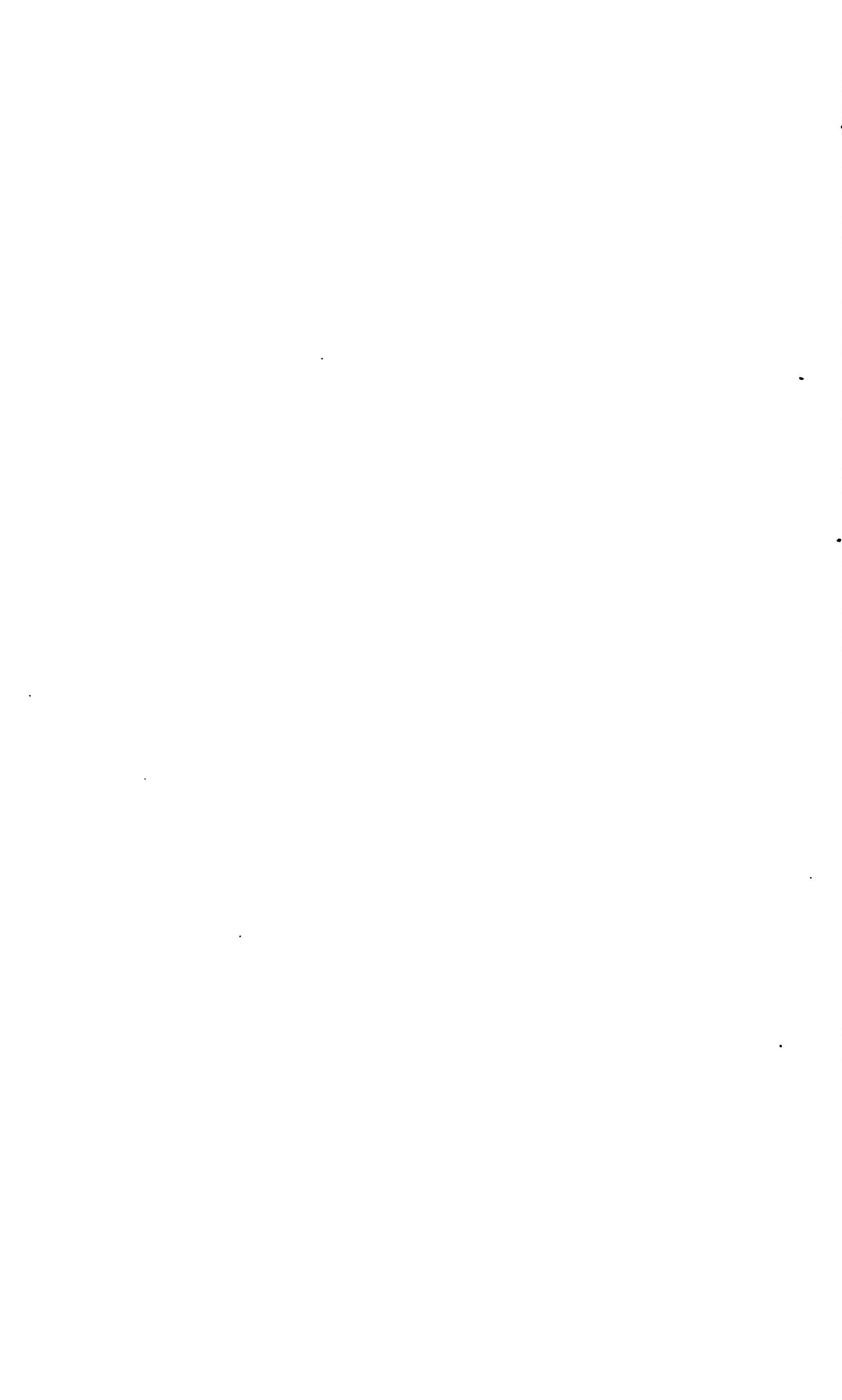
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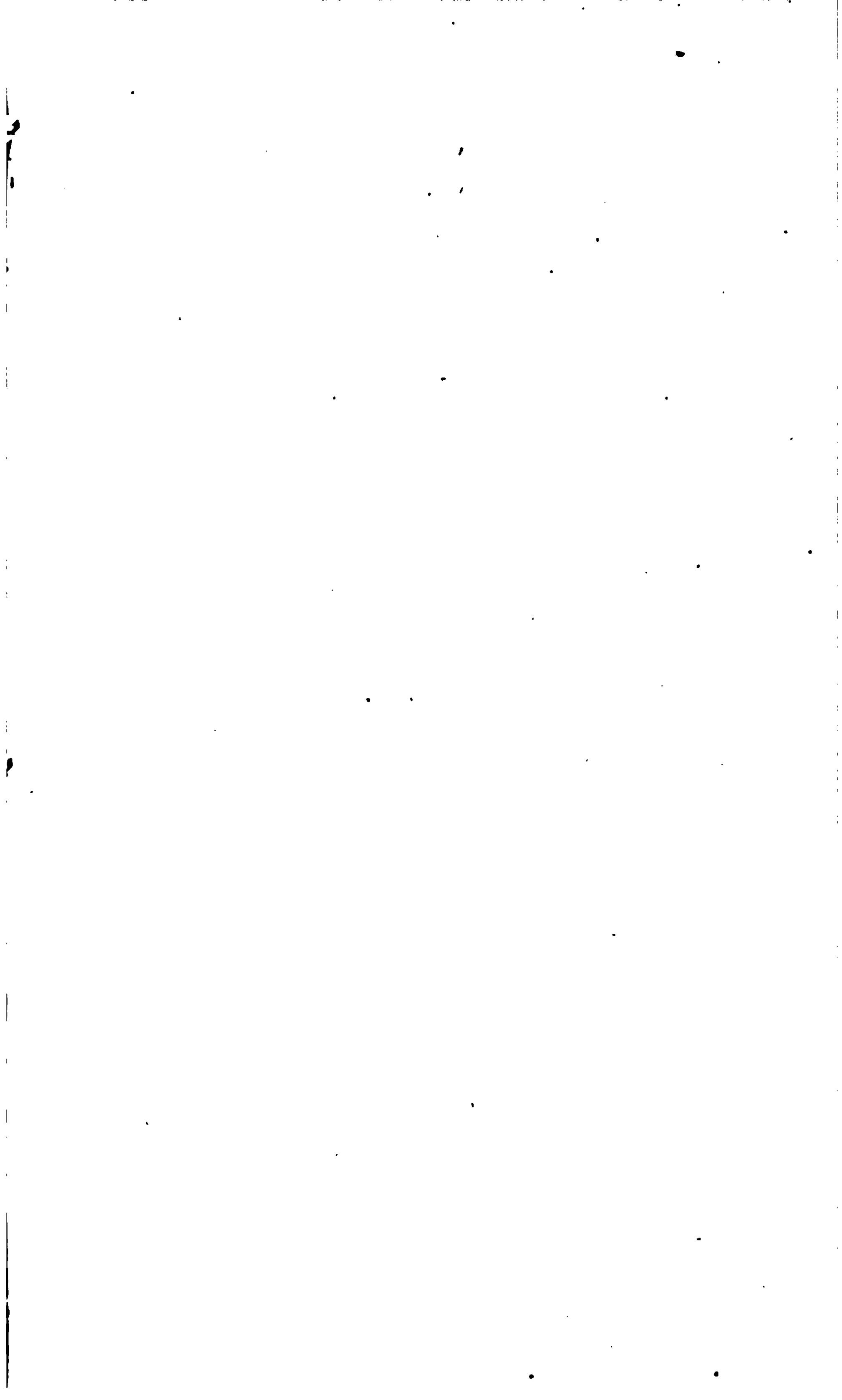
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OFFICIAL OPINIONS
OF
THE ATTORNEYS GENERAL
OF
THE UNITED STATES,
ADVISING THE
PRESIDENT AND HEADS OF DEPARTMENTS
IN RELATION TO THEIR OFFICIAL DUTIES,
AND EXPOUNDING THE CONSTITUTION, TREATIES WITH FOREIGN
GOVERNMENTS AND WITH INDIAN TRIBES, AND
THE PUBLIC LAWS OF THE COUNTRY.

EDITED BY
A. J. BENTLEY, Esq.

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ERRATA.

On page 3, in the first *head-note*, third line, after the word "report" strike out "but who."

On page 42, in fourth line of Note, after the word "officers" insert "and surveyors."

On page 307, tenth line from bottom, after the word "impediment" strike out "of" and insert "to."

On pages 336, 337, and 338, instead of the name "Halleck" or "Hallack," read "Kalloch."

On page 400, twenty-sixth line from top, before the word "claim" strike out "a" and insert "the."

On page 407, twelfth line from bottom, before the word "mandatory" strike out "and" and insert "not."

On page 480, fifteenth line from top, before the word "judgment" strike out "first" and insert "final."

On page 543, fifth line from top, before the word "embraces" strike out "municipal" and insert "municipality;" and on same page, eleventh line from bottom, strike out "officers" and insert "offices."

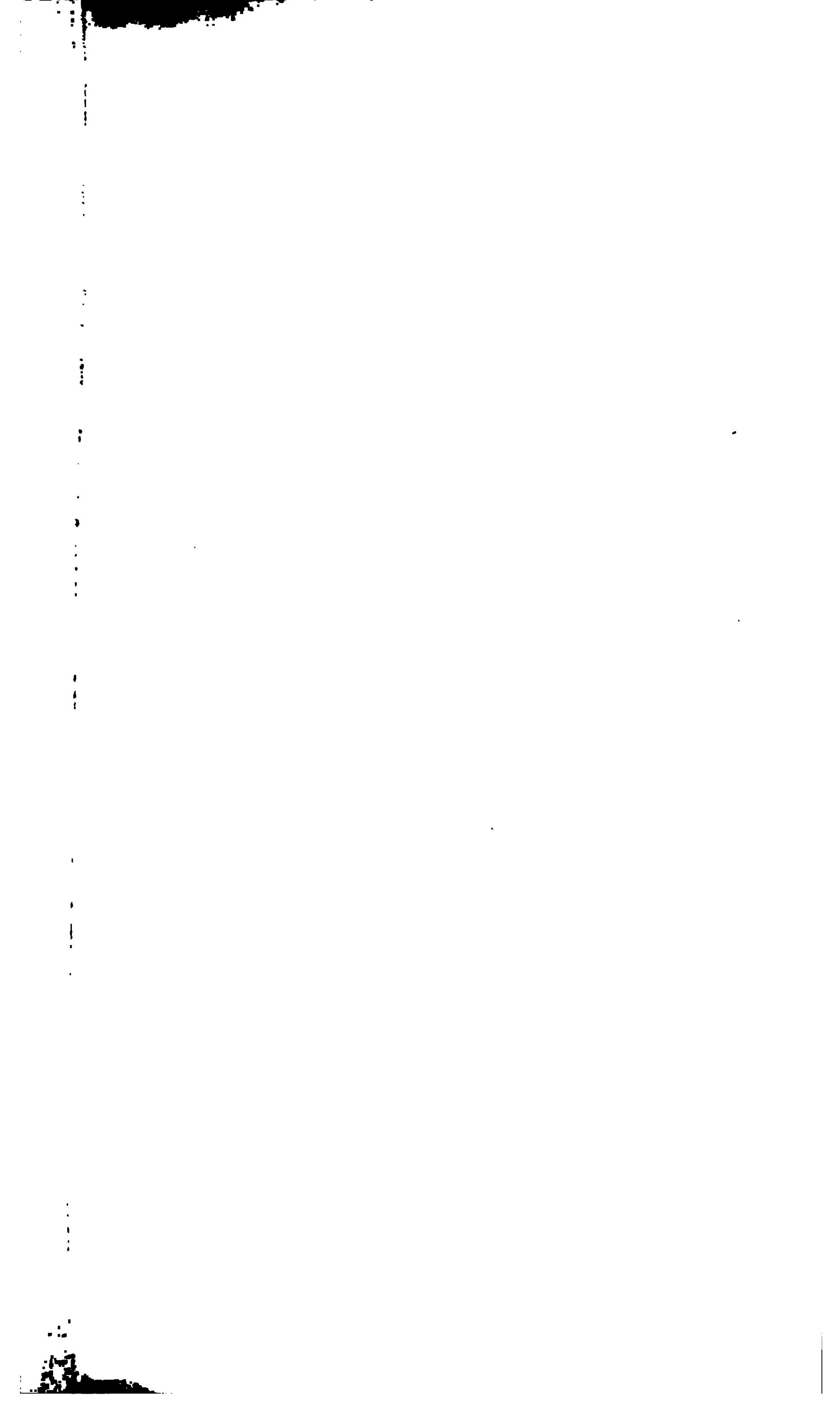
On page 549, ninth line from bottom, strike out "international" and insert "internal."

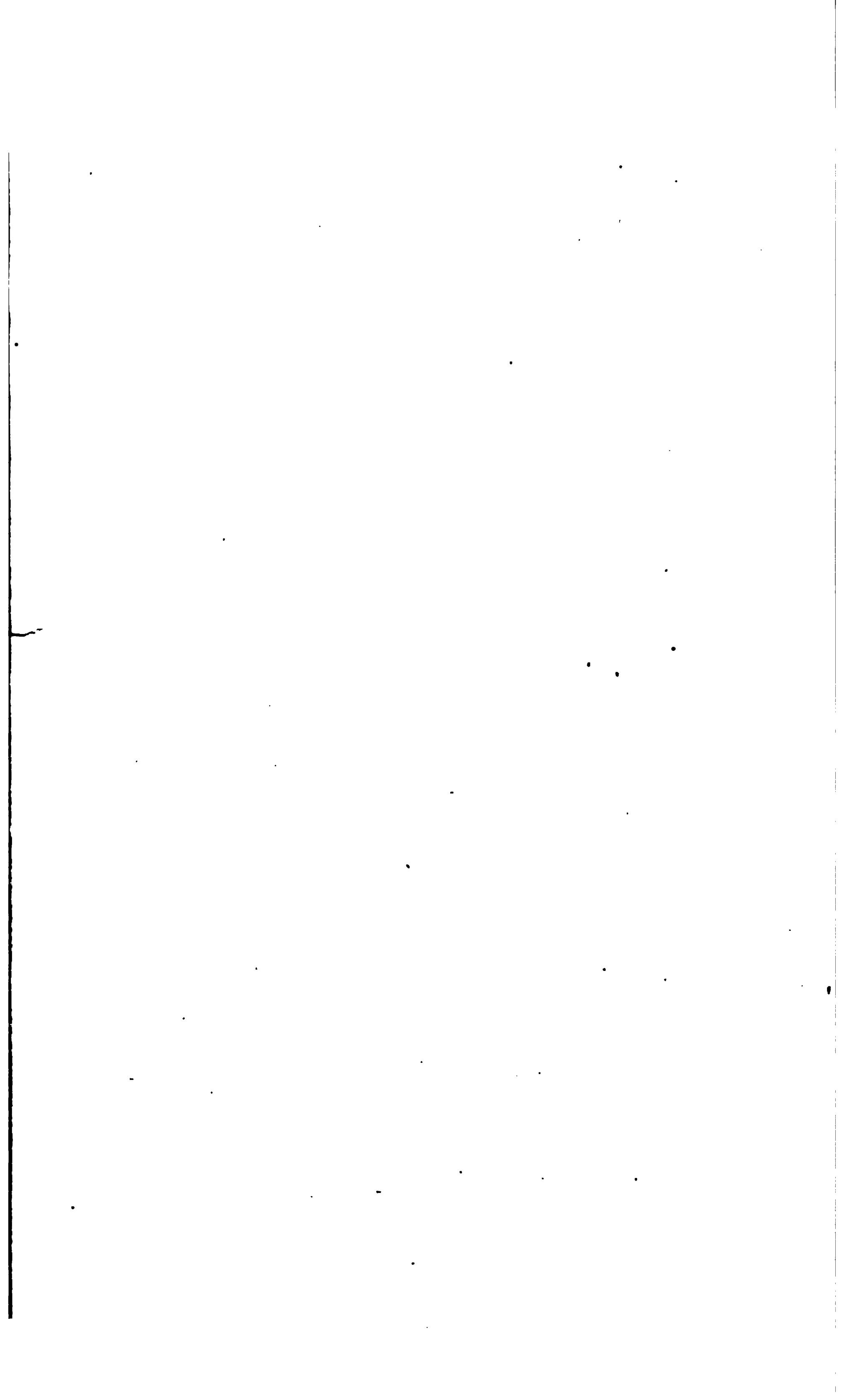
On page 564, fifteenth line from bottom, strike out "made" and insert "true;" and on same page, next line below, strike out "clearly" and insert "already."

On page 587, top line, after the word "have" insert "been."

On page 615, sixth line from top, after the word "report" strike out "but who."







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O P I N I O N S
OF
HON. EBENEZER R. HOAR, OF MASSACHUSETTS.
APPOINTED MARCH 5, 1869.

ADVANCING OFFICERS IN THE NAVY.

The President, by and with the advice and consent of the Senate, has power to advance a naval officer, in his own grade, not exceeding thirty numbers, for distinguished conduct in battle or extraordinary heroism.

ATTORNEY-GENERAL'S OFFICE,
March 11, 1869.

SIR: I have the honor to acknowledge the receipt of your letter of the 10th instant, requiring my opinion on the following question: "Whether the President of the United States is authorized by law to advance an officer in the Navy, in the grade to which he belongs, for distinguished conduct in battle?"

Upon examination I find that, by the 6th section of the act of April 21, 1864, (13 Stat., 54,) "any officer in the naval service, by and with the advice and consent of the Senate, may be advanced, not exceeding thirty numbers, in his own grade, for distinguished conduct in battle, or extraordinary heroism."

Similar provision is also made by the 1st section of the act of April 24, 1865, (*ibid.*, 424,) for advancing a naval officer not exceeding thirty numbers, "for having exhibited eminent and conspicuous conduct in battle, or extraordinary heroism."

These provisions, so far as they authorize the advancement of such officers in rank "for distinguished conduct in battle or extraordinary heroism," are, by the 1st section of the act

Franking Privilege.

of July 25, 1866, (14 Stat., 222,) recognized as then subsisting, and they seem to be still in force.

It thus appears that the President may advance an officer of the Navy, in his own grade, not exceeding thirty numbers, for distinguished conduct in battle; by and with the advice and consent of the Senate.

I remain, with profound respect,

E. R. HOAR.

The PRESIDENT.

FRANKING PRIVILEGE.

The Postmaster-General may, by regulation, authorize officers in or belonging to the various Executive Departments, legally designable as chief clerks, whether of the Departments proper or of Bureaus therein, to frank official communications.

ATTORNEY-GENERAL'S OFFICE,

March 19, 1869.

SIR: I have considered the question proposed by you, viz., whether, under the laws relating to the franking privilege, authority to frank mail matter may be given to chief clerks of Bureaus in the Executive Departments.

The 42d section of the act of March 3, 1863, (12 Stat., 708,) confers the privilege upon "such principal officers, being heads of Bureaus or chief clerks, of each Executive Department, to be used only for official communications, as the Postmaster-General may by regulation prescribe."

I am of opinion that all officers in or belonging to the various Executive Departments, legally designable as chief clerks, are within the meaning of this provision; and that it is competent to the Postmaster-General to authorize, by regulation, any of these officers, whether chief clerks of Bureaus or of the Departments proper, to frank official communications.

By reference to the subsequent act of June 1, 1864, (13 Stat., 95,) providing for the transmission, free of postage, of all communications relating to the official business of the Departments, it will be observed that terms of description are there employed of similar import with those above

Dismissal of Military Officers from Service.

quoted, and which manifestly include chief clerks of Bureaus.

I have the honor to be, &c.,

E. R. HOAR.

Hon. POSTMASTER-GENERAL.

NOTE.—By the recent act of January 31, 1873, the franking privilege was abolished from and after July 1, 1873, and it was provided that thenceforth all official correspondence, of whatever nature, and other mailable matter sent from or addressed to any officer of the Government or person then authorized to frank such matter, should be chargeable with the same rates of postage as may be lawfully imposed upon like matter sent by or addressed to other persons.

DISMISSAL OF MILITARY OFFICERS FROM SERVICE.

Where a captain in the Marine Corps, in whose favor an examining board convened by the Secretary of the Navy under the 17th section of the act of August 3, 1861, had made a favorable report, but who was, notwithstanding such report, subsequently (in December, 1864,) dismissed from the service by a general order of the Navy Department: *Held* that the officer was lawfully removed from the service.

At that period, by virtue of the 17th section of the act of July 17, 1862, the President was fully invested with a statutory power of summary dismissal respecting officers in the Army, Navy, and Marine Corps, which it was competent to him to exercise at discretion.

The order of dismissal promulgated by the Secretary of the Navy, though containing no express reference to the direction of the President, was nevertheless sufficient.

ATTORNEY-GENERAL'S OFFICE,

March 24, 1869.

SIR: I have the honor to acknowledge the receipt of your letter of the 16th instant, relative to the case of E. McD. Reynolds, formerly captain in the United States Marine Corps.

It appears from the papers submitted to me, that in October, 1864, a board of marine officers was convened by direction of the Secretary of the Navy for the purpose of examining such cases as might be referred to it under the 16th and 17th sections of the act of August 3, 1861, (12 Stat., 289, 290,) providing for the retirement of incapacitated and disabled officers of the Army and Marine Corps, and that

Dismissal of Military Officers from Service.

among the cases so referred was that of Captain E. McD. Reynolds. The board made a favorable report upon his case, finding him "mentally, morally, professionally, and physically fit for the performance of all the duties of his office." Not satisfied with this, however, the record of the proceedings was afterward submitted by the Department to three officers of high rank for examination, who, in November, 1864, reported that the finding of the board was in their opinion supported by the evidence adduced in the particulars of mental, physical, and professional qualifications, but not in the particular of moral fitness. Subsequently, by general order of the Navy Department, No. 43, dated December 7, 1864, Captain Reynolds was, on grounds therein set forth, dismissed from the service.

It is urged in his behalf that the President could not dismiss without trial, much less after trial and acquittal; that the order of dismissal having been issued by the Secretary of the Navy without stating that it was done by direction of the President, was ineffectual; and that, therefore, Captain Reynolds never ceased to be an officer in the Marine Corps. I assume that the foregoing is an accurate statement, in all substantial particulars, of the facts of this case.

At the period referred to, the President was fully invested, by statute, with the power of summary dismissal, capable of being exercised by him at discretion; namely, by the 17th section of the act of July 17, 1862, (12 Stat., 96,) under the provisions of which he was "authorized and requested to dismiss and discharge from the military service, either in the Army, Navy, Marine Corps, or volunteer force in the United States service, any officer for any cause which, in his judgment, either renders such officer unsuitable for, or whose dismission would promote the public service." That it was competent to the President to dismiss Captain Reynolds, under the authority conferred by this statute, irrespective of the finding of the board in his case, there is no room to doubt. I do not deem it necessary, in view of this statutory authority of the President, to consider the constitutional question so often discussed as to his power, independently of statute, to dismiss an officer without trial from the military service.

Requisitions for Payment of Certified Balances.

I may remark that the act of March 3, 1865, sec. 12, (14 Stat., 489,) was passed subsequently, and does not affect this case.

The remaining question is, whether the order of dismissal promulgated by the Secretary of the Navy, which contained no express reference to the direction of the President in the premises, was sufficient for the purpose intended. This belongs to the general subject of the relation of the President to the Executive Departments, a subject that has already been elaborately and learnedly discussed by Attorney-General Cushing in an opinion dated August 31, 1855, (7 Opins., 453,) in which, on the authority of judicial decisions and of the arguments, constitutional and statutory, therein adduced, he concludes "that, as a general rule, the direction of the President is to be presumed in all instructions and orders issuing from the competent Departments; and that official instructions issued by the heads of the several Executive Departments, civil or military, within their respective jurisdictions, are valid and lawful without containing express reference to the direction of the President."

I perceive nothing in the case of Captain Reynolds that makes the order dismissing him an exception to the rule here laid down, which is too well established, both in theory and practice, to be now questioned. Upon the whole, then, I think that Captain Reynolds was lawfully removed from and is now out of the service, and that he can be restored only by means of a new appointment in the manner provided by law.

I have the honor to be, &c.,

E. R. HOAR.

Hon. A. E. BORIE,
Secretary of the Navy.

REQUISITIONS FOR PAYMENT OF CERTIFIED BALANCES.

Where a claim or account against the Government, arising in the military service, has been adjusted by the accounting officers of the Treasury, and the balance found due thereon certified by the Comptroller to the War Department for payment, the Secretary of War

Requisitions for Payment of Certified Balances.

cannot lawfully withhold his requisition simply on the ground that the balance so certified is in excess of what the officers of his Department deem to be allowable.

Where the question is merely one of computation or amount, the decision of the accounting officers is to be regarded as final.

Provisions of the acts of March 3, 1817, and March 30, 1868, relating to this subject, considered.

ATTORNEY-GENERAL'S OFFICE,
March 25, 1869.

SIR: In your letter of the 17th instant, you submit a communication from General James A. Hardie, dated the 13th, with other papers, respecting certain claims or accounts against the Government arising in the military service, which have been adjusted by the accounting officers of the Treasury, and the balances found due thereon certified by them to the War Department for payment, but which remain as yet unpaid; and request an opinion "as to the proper course to be pursued" by you in the premises, having regard to the provisions of the act of March 30, 1868. (15 Stat., 54.)

It appears that, in reference to these claims, the officers of the War Department and the accounting officers of the Treasury Department differed concerning the *quantum* properly allowable thereon, and that the amounts allowed by the latter in the adjustment thereof are in excess of the amounts approved by the former. No difference of opinion, however, appears to have existed between them touching the validity of the claims, or whether the settlement of the claims was authorized by law. The question which, it would seem, you desire me to consider is, whether it is your duty, under these circumstances and in view of the enactment above mentioned, to issue requisitions for the amounts found due by the accounting officers upon settlement of the claims referred to.

The statute cited above was obviously intended to meet just such a case as the one here presented. By the act of March 3, 1817, (3 Stat., 366,) "all claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or creditors," are required to be "settled

Performing Duties of Vacant Office—Compensation.

and adjusted in the Treasury Department." The recent law of 1868 declares that the "balances, when stated by the Auditor and properly certified by the Comptroller, as provided by the act, shall be taken and considered as final and conclusive upon the executive branch of the Government, and be subject to revision only by Congress or the proper courts," with the proviso, however, that a head of Department may, before signing a warrant for any such balance, submit to the Comptroller any facts which, in his judgment, affect the correctness of the balance, but that the decision of the Comptroller thereon is to be final and conclusive.

It is very plain, then, that where, as in the case under consideration, the question is merely one of computation or amount, the decision of the accounting officers of the Treasury is to be regarded as final. The Secretary of War cannot, therefore, lawfully withhold his requisition, simply on the ground that the balance certified to him by the Comptroller is in excess of what the officers of his Department deem to be allowable.

I have the honor to be, &c.,

E. R. HOAR.

Hon. JOHN A. RAWLINS,

Secretary of War.

PERFORMING DUTIES OF VACANT OFFICE—COMPENSATION.

An officer who temporarily performs the duties of a vacant office, under the provisions of the act of July 23, 1868, cannot be allowed, for the period during which he discharges this service, any salary other than what is annexed to the office he holds which would involve an increase of compensation.

The provision in the 3d section of that act, which declares that "the officer so performing the duties of the office temporarily vacant shall not be entitled to extra compensation therefor," was designed to be general, and applies as well to those vacancies which are supplied by operation of the statute as to those which are filled by designation of the President.

ATTORNEY-GENERAL'S OFFICE,

March 26, 1862.

SIR: I have considered the subject of your letter of the

Performing Duties of Vacant Office—Compensation.

22d instant, and of the accompanying communication of the First Comptroller.

The case presented is that of a vacant office whose duties have been performed during the vacancy by the incumbent of an inferior office, under the provisions of the act of July 23, 1868, (15 Stat., 168,) entitled "An act to authorize the temporary supplying of vacancies in the Executive Departments;" and upon this is suggested the question whether the officer who performed the duties of the vacant office is entitled, for the period during which he discharged this service, to receive the higher compensation provided for such vacant office in lieu of the salary belonging to the office held by him.

In the 3d section of that act it is expressly declared that the "officer so performing the duties of the office temporarily vacant shall not be entitled to extra compensation therefor." The only doubt that seems to arise here is, whether this clause is limited to such vacancies as are filled by designation of the President, or includes also those which are supplied by operation of the statute. But I perceive no reason for any discrimination between these two classes in the matter of compensation, or why, in the one case, the officer filling the vacancy should receive an additional allowance, and be excluded from it in the other; and I am led to believe that the prohibition was designed to be general, and to apply to every officer performing the duties of an office temporarily vacant, whether the vacancy was caused by death, resignation, absence, or sickness, and whether such duties devolved upon him by force of the statute or by designation of the President in pursuance of its provisions.

I am accordingly of opinion that the clause referred to bars the allowance of any salary to such officer other than what is annexed to the office he holds which involves an increase of compensation.

I have the honor to be, &c.,

E. R. HOAR.

Hon. GEO. S. BOUTWELL,
Secretary of the Treasury.

Regulations of the Navy.

CASE OF J. AND R. H. PORTER.

The award of the Third Auditor in this case, made on the 10th of May, 1861, under the act of March 3, 1849, chap. 129, is no longer of any force.

ATTORNEY-GENERAL'S OFFICE,

March 27, 1869.

SIR: I have examined with care the case of the Messrs. J. and R. H. Porter, as exhibited in the papers transmitted to this office under cover of a letter from your predecessor of the 14th of January last, in which this question is presented: Whether the award made by the Third Auditor in that case on the 10th of May, 1861, in favor of those parties, under the act of March 3, 1849, chap. 129, (9 Stat., 414,) is at present in full force, and, also, if any additional payment on the claim should be made by your Department.

Upon consideration of all the facts, I arrive at the conclusion that the award referred to is no longer of any force. The 8th section of the act of July 28, 1866, (14 Stat., 327,) which introduces a provision applicable to this case, requires the Third Auditor to "transmit his adjustment, with all the papers relating thereto, to the Second Comptroller for his revision and decision," &c. To entitle the parties to any additional payment on their claim, it must now be passed upon and approved by the Second Comptroller in the manner there provided. The papers are herewith returned.

I have the honor to be, &c.,

E. R. HOAR.

Hon. GEO. S. BOUTWELL,
Secretary of the Treasury.

REGULATIONS OF THE NAVY.

The regulations adopted by the Secretary of the Navy, with the approbation of the President, on March 13, 1863, concerning the relative rank of the staff officers of the Navy, in so far as they are alterations of the orders of the Secretary of the Navy, to which legislative sanction was given by the acts of August 5, 1854, chap. 268, sec. 4, and March 3, 1859, chap. 76, sec. 2, are not founded upon valid authority of law.

Regulations of the Navy.

Those orders are not properly within the provision of the 5th section of the act of July 14, 1862, chap. 164, from which was drawn the supposed authority to alter or modify them, and establish new and different regulations on the subject to which they relate.

The opinion of Attorney-General Bates (10 Opins., 413) dissented from.

ATTORNEY-GENERAL'S OFFICE,
March 31, 1869.

SIR: I have carefully considered the question presented in your letter of the 26th instant touching the validity of the regulations adopted by the Secretary of the Navy, with the approbation of the President of the United States, on the 13th of March, 1863, establishing and increasing the relative rank of the staff officers of the Navy.

These regulations, I understand, are alterations or modifications of certain orders of the Secretary of the Navy, dated August 31, 1846, May 27, 1847, and January 13, 1857, upon relative rank, to which Congress by the acts of August 5, 1854, chap. 268, sec. 4, and March 3, 1859, chap. 76, sec. 2, gave the force and effect of law. And the authority of the Secretary of the Navy, with the approval of the President, to alter or modify those orders, and establish new and different regulations on the subject to which they relate, was supposed to be derived from the provision of the 5th section of the act of July 14, 1862, chap. 164, as follows: "That the orders, regulations, and instructions heretofore issued by the Secretary of the Navy be, and they are hereby, recognized as the regulations of the Navy Department, subject, however, to such alterations as the Secretary of the Navy may adopt, with the approbation of the President of the United States."

The first question I will consider is, whether, by the true construction and effect of this provision, the regulations of the Department establishing the relative rank of certain staff officers of the Navy, which were sanctioned and ratified by the acts of 1854 and 1859, are comprehended by the designation of "orders, regulations, and instructions heretofore issued by the Secretary of the Navy," and, as within that description, subject to alteration at the will and pleasure of the Executive

The acts of 1854 and 1859, either in terms or in effect, gave to the orders of the Department to which they referred the force and efficiency of law. Until sanctioned and ratified by Con-

Regulations of the Navy.

gress, those orders were without authority and void, as establishing rules and regulations upon a subject-matter which was exclusively of legislative cognizance. When so sanctioned and ratified, as they were by the statutes that have been mentioned, they were placed upon the footing of legislative acts, and were incorporated into the statute law on the subject of the Navy and its organization.

Such being the character and effect given to the orders of the Department under consideration by the acts of 1854 and 1859, nothing less than a statute, expressly or by necessary intendment authorizing the President to alter the provisions of those orders, can be regarded as a sufficient warrant for the exercise of such a power. The act of 1862 is not such a statute, as is clearly shown by the commissioners appointed to consolidate the laws in their remarks upon this subject. The orders sanctioned by the acts of 1854 and 1859 passed by the operation of those acts, as I have already intimated, into the form of law. They ceased to be orders or regulations of the Executive, and became laws of Congress. No such general words of description as those employed in the act of 1862—"orders, regulations, and instructions heretofore issued by the Secretary of the Navy"—can be fairly or properly treated as comprehending or embracing them. Besides, the orders, regulations, and instructions mentioned in the 5th section of the act of 1862 are expressly recognized thereby "*as the regulations of the Navy Department.*" The orders of the Secretary of the Navy, which were ratified by the acts of 1854 and 1859, had been previously recognized and established by that legislation as regulations of Congress on the subject of the relative rank of staff officers of the Navy. It cannot be supposed that Congress intended to change entirely the character which it had previously given to those orders, and remove them from the category of laws and place them in that of executive regulations.

In this view of the subject, the orders sanctioned by the statutes of 1854 and 1859 are altogether without the purview of the 5th section of the act of 1862. But conceding that, by the terms of that section, the entire body of "orders, regulations, and instructions" theretofore issued and promulgated by the Secretary of the Navy, including those which were

Regulations of the Navy.

within the scope of mere executive authority, as well as those regulations that had the force and effect of law, as having been expressly sanctioned by Congress, or previously sanctioned by legislative authority, were within the contemplation of Congress in enacting this statute, still I think that the provision which, it is supposed, authorized the regulations of March 13, 1863, was only intended to recognize the power of the President to alter regulations which he was originally competent to adopt and promulgate without the express authority of Congress. No just rule of construction would authorize giving to this provision the force and effect of a general delegation of legislative authority to the Executive, at his pleasure to pass upon and regulate subjects which were, in their own nature, exclusively subjects of legislative action and cognizance, or which Congress had previously fixed by law, and which the regulations thereby recognized had not undertaken to modify or alter.

My opinion therefore is, that the regulations of March 13, 1863, in so far as they are alterations of the orders of the Secretary of the Navy, to which Congress gave its legislative sanction by the acts of August 5, 1854, chap. 268, sec. 4, and March 3, 1859, chap. 76, sec. 2, are not founded upon valid authority of law.

I thus dissent from the opinion of Mr. Attorney-General Bates, by whose advice, it appears, these regulations were adopted. (10 Opins., 413.) I find, however, that the attention of this learned gentleman appears not to have been directed to the orders of 1846, 1847, and 1859, or to the effect of the two statutes which gave them the force and efficiency of law. The question of the proper construction of the act of 1862 was presented to him in an abstract form before the adoption of the regulations of 1863, and without any suggestions which would naturally lead him to consider the character and effect of the previous orders on the subject of relative rank. It is not surprising, therefore, that he should have come to a conclusion in regard to the effect of the act of 1862, in which I am not able to express my concurrence.

I have the honor to be, &c.,

E. R. HOAR.

Hon. A. E. BORR,

Secretary of the Navy.

Promotions in the Army.

PROMOTIONS IN THE ARMY.

By the laws and regulations of the military service in force at the passage of the act of March 3, 1869, chap. 124, vacancies in established regiments and corps, to the rank of colonel, were required to be filled by promotion according to seniority, except in case of disability or other incompetency.

But these laws and regulations do not confer upon the officer next in the order of succession any right to the vacant place; this he can acquire only by virtue of a new commission.

The 2d and 6th sections of said act operate to prevent the nomination, for promotion, of infantry and staff officers who were eligible to promotion prior to March 3, 1869, except as therein provided.

ATTORNEY-GENERAL'S OFFICE,

April 5, 1869.

SIR: The late Secretary of War, General Schofield, addressed a letter to this office, under date of the 12th ultimo, in which, after stating that "certain nominations for promotions in the staff corps, in the cavalry, infantry, and artillery of the Army, submitted by the President to the Senate for confirmation, during the third session of the Fortieth Congress, failed to receive the action of that body," and also directing attention to the provisions concerning appointments and promotions in the Army, contained in the 2d and 6th sections of the act of March 3, 1869, entitled "An act making appropriations for the support of the Army," &c., (15 Stat., 318,) he proposed the following questions for opinion:

1. "Does this act prevent the nomination and renomination of those officers who were entitled to promotion prior to March 3, 1869?

2. "Under the laws and legalized regulations governing promotions in the Army, and the mandatory acts fixing the organization of staff corps and regiments, what are the legal rights of officers to promotion to vacancies occurring prior to the act of March 3, 1869, by which the laws in operation till that date were modified?"

The sections of the recent act to which reference is made by the Secretary read as follows:

"SEC. 2. *And be it further enacted*, That there shall be no new commission, no promotions, and no enlistments in any

Promotions in the Army.

infantry regiment until the total number of infantry regiments is reduced to twenty-five; and the Secretary of War is hereby directed to consolidate the infantry regiments as rapidly as the requirements of the public service and the reduction of the number of officers will permit."

"SEC. 6. *And be it further enacted,* That until otherwise directed by law there shall be no new appointments and no promotions in the Adjutant-General's Department, in the Inspector-General's Department, in the Pay Department, in the Quartermaster's Department, in the Commissary Department, in the Ordnance Department, in the Engineer Department, and in the Medical Department."

By the law of the service in force at the passage of this act, all vacancies in established regiments and corps to the rank of colonel were required to be filled by promotion according to seniority, except in case of disability or other incompetency. Promotions to the rank of captain were made regimentially; to the rank of major, lieutenant-colonel, and colonel, according to the arm, as infantry, artillery, &c.; and in the staff departments according to corps. Appointments above the rank of colonel were made by selection. See Army Regulations, par. 19, 20, 21; also, acts of March 30, 1814, (3 Stat., 114,) March 3, 1851, (9 Stat., 618,) and July 28, 1866, sec. 37, (14 Stat., 337.)

But these laws and regulations prescribe only the mode in which vacancies shall be filled; they do not confer upon the officer next in the order of succession any right to the vacant place. This he can acquire only by virtue of a new commission.

The 2d section of the act of 1869 prohibits the issuing of any new commission thereafter, whether by way of promotion or by original appointment, in any *infantry* regiment, "until the total number of infantry regiments is reduced to twenty-five;" that is to say, until the number of officers holding commissions in such regiments under their then existing organization is reduced to the complement required for twenty-five regiments.

The 6th section of the same act likewise prohibits the issuing of new commissions, either by way of promotion or by original appointment, in the various staff departments enumer-

Compensation of District Attorneys.

ated "until otherwise directed by law." The object thereby had in view manifestly was to effect a reduction of force in these departments corresponding with that sought to be effected by the other section in the line of the Army.

These provisions plainly operate to prevent the nomination and renomination of infantry and staff officers who were eligible to promotion prior to March 3, 1869, except as therein provided.

I have the honor to be, &c.,

E. R. HOAR.

Hon. JOHN A. RAWLINS,
Secretary of War.

COMPENSATION OF DISTRICT ATTORNEYS.

An account of a United States attorney, in California, for professional services not falling within the scope of his official duties, rendered in a matter concerning the title to certain property in that State under the charge and supervision of the Treasury Department, held to be allowable out of the appropriate funds of that Department.

ATTORNEY-GENERAL'S OFFICE,

April 8, 1869.

SIR: I have considered the subject of your letter of the 5th instant, touching an account of B. C. Whiting, esq., late United States attorney for the southern district of California, for professional services rendered by him not falling within the scope of his official duties, in connection with the light-house site at Point Pinos, California, and the custom-house lands at the port of Monterey, California.

The appropriation to which you refer, making provision for the services of special counsel in defending the title of the United States to "public property" in California, (11 Stat., 307,) is not applicable to the payment of this claim. That fund applies only to cases where the subject of litigation is the title to lands which form a part of the public domain, and not where the controversy is about the title to lands which have been purchased or reserved for light-houses, custom-houses, barracks, navy-yards, &c., and which are

Case of Lieutenant Helms.

severed from the public domain. The account should, therefore, be referred to the Treasury Department, under whose charge and supervision the property, in respect of which the services were rendered, is placed, for allowance out of the appropriate funds of that Department.

The papers received with your communication are herewith returned.

I have the honor to be; &c.,

E. R. HOAR.

Hon. J. D. Cox,

Secretary of the Interior.

CASE OF LIEUTENANT HELMS.

Where a volunteer officer in the military service of the United States was sentenced by a court-martial to suspension of rank and pay for a certain period, before the expiration of which he was mustered out of service and discharged: Held that the sentence did not work a forfeiture of the three months' extra pay provided by the 4th section of the act of March 3, 1865, chap. 81, but merely deprived the officer, during his continuance in service and while it remained in force, of his regular current pay.

To entitle an officer to the extra pay provided in the enactment referred to, it is not necessary that he shall have received an "honorable" discharge; the character of the discharge not being an essential element in the claim.

Regularly, an officer or soldier, upon his discharge from the military service, is entitled to an honorable discharge, unless he is under sentence of dishonorable dismissal, or unless he has been convicted of an infamous offense, and is sentenced to punishment therefor during the remainder of his term of service, or of conduct reflecting upon his military career, such as cowardice, &c., with either of which conditions an honorable discharge would be incompatible.

Where an honorable discharge from the military service has in fact been received, and was given by competent authority, the subsequent cancellation of the discharge certificate, which is only evidence of such discharge, cannot avoid the latter, nor make it capable of modification to the prejudice of the person discharged.

ATTORNEY-GENERAL'S OFFICE,
April 10, 1869.

SIR: The case of Benjamin R. Helms, formerly second lieutenant of the First Regiment of Indiana Artillery, pre-

Case of Lieutenant Helms.

sented in your letter of the 31st ultimo, is substantially as follows:

Lieutenant Helms, in a court-martial proceeding against him, received a sentence of suspension from rank and pay for three months, which took effect December 28, 1865. On the 10th of January, 1866, while under this sentence, his regiment was mustered out of service, and he along with it, when a certificate of honorable discharge was given him similar to that given to each of the other officers of the regiment. Subsequently, upon his application for final settlement of his account for services as an officer, the Adjutant-General, learning that he had been honorably discharged with his regiment, and conceiving that he was not entitled to such a discharge, requested him to forward his discharge-paper to the Adjutant-General's office, upon receipt of which it was there canceled, and directions were given him to apply to the chief mustering officer for Indiana, who would furnish him with a discharge, but not an honorable one. At the same time he was advised that his claim for three months' extra pay was not allowed.

Upon these facts the opinion of the Attorney-General is asked as to the legal right of Lieutenant Helms to an honorable discharge from service, and to the three months' extra pay.

It is understood that the pay is claimed under the 4th section of the act of March 3, 1865, (13 Stat., 497,) which declares that all volunteer officers under the rank of brigadier-general, then in commission, who shall continue in the military service to the close of the war, "shall be entitled to receive, upon being mustered out of said service, three months pay proper." Here, it is to be observed, the act does not require that an officer shall receive an "honorable" discharge to entitle him to this pay; so that the character of his discharge, whether honorable or dishonorable, does not seem to constitute an essential element in a claim for this compensation. If the terms of the law are satisfied, in respect of the period when the officer was in commission, his rank, his continuance in service, and his muster-out, this is enough, and he thereupon becomes fully invested with a right to the compensation provided.

The effect of the sentence, in the case under consideration,

Case of Lieutenant Helms.

was not to work a forfeiture of this compensation or any part thereof, but simply to deprive the officer of his regular current pay, while under its operation and subject to military law; in other words, that to which he was otherwise entitled during his continuance in service, and while the sentence was in force, not that which the law provided for him after his connection with the service ceased, and the sentence necessarily expired.

I conclude, then, that if the character of the discharge to which Lieutenant Helms is supposed to have been entitled forms the only ground of objection to the admission of his claim, (and none other is suggested,) the objection is without valid foundation, and he should be allowed the extra compensation.

But with reference to the other branch of the subject presented, viz., as to the right of Lieutenant Helms to a certificate of honorable discharge, this, I think, cannot justly be withheld. Regularly, an officer or soldier, upon his discharge from service, may be regarded as entitled to an honorable discharge, unless he is under sentence of dishonorable dismissal, or unless he has been convicted of an infamous offense, and is sentenced to punishment therefor during the remainder of his term of service, or of conduct reflecting upon his military career, such as cowardice, &c., with either of which conditions an honorable discharge would be incompatible; but none of these circumstances here appears. Besides, Lieutenant Helms having *in fact* received an honorable discharge, and presuming this to have been given by competent authority, the subsequent cancellation of the certificate thereof, which was only an evidence of such discharge, did not operate to avoid the discharge itself, nor make it capable of modification to the prejudice of the officer.

I have the honor to be, &c.,

E. R. HOAR.

Hon. JOHN A. RAWLINS,
Secretary of War.

Claim of R. W. Gibbes against New Granada.

CLAIM OF R. W. GIBBES AGAINST NEW GRANADA.

The claim, in this case, having been duly referred to the board of commissioners constituted under the convention with New Granada of September 10, 1857, and submitted to an umpire authorized by that convention, who reported his award during the existence of the board, but payment of which was suspended at the Treasury by request of the Secretary of State, and the case afterward referred, without the claimant's consent, to the commission constituted under the convention of February 10, 1864, with the United States of Colombia as the representative of the late republic of New Granada: *Held* that, by the submission of the claim to this commission in the manner stated, the claimant was not divested of his rights against New Granada under the award of the umpire aforesaid.

The award not having been vacated, opened, or set aside during the lifetime of the former commission or board, and the claimant having done nothing since to waive his rights thereunder, it should be treated by our Government as a valid and conclusive ascertainment of his claim against New Granada.

But under the 7th section of the act of February 20, 1861, chap 45, the claimant, in order to receive payment at the Treasury of the amount awarded to him, is required to produce a certificate of the board of commissioners in his favor.

• **ATTORNEY-GENERAL'S OFFICE,**
April 10, 1869.

SIR: I have considered with much care the questions which appear to be presented for the determination of the Government in the case of R. W. Gibbes, a claimant against New Granada, under the convention with that republic of September 10, 1857, (12 Stat., 985.)

Having examined this case in the light of the information submitted by your Department to my predecessors, Mr. Stanbery and Mr. Evarts, I found it necessary, as I thought, to inspect the original journal of the commission constituted under that convention, and, accordingly, in my letter of the 25th ultimo, I requested you to furnish me with that document. You have complied with that request, and I am now able to give you my views upon the case.

The facts are mainly these: The claim of R. W. Gibbes, a citizen of the United States, against New Granada, was duly referred to the board of commissioners constituted

Claim of R. W. Gibbes against New Granada.

under the convention of September 10, 1857, between that republic and the United States. The journal of the commission shows that, on the 3d of February, 1862, the case was called and taken up for consideration, and that, on the next day, it was submitted to the umpire for his decision. The evidence of this action of the board is the following entry in its journal:

"The case of Robert W. Gibbes, No. 12, was called, having been submitted by Mr. Causten, counsel for claimant, some time since on the papers. Mr. Carlisle, after making some remarks in opposition to the claim, submitted the case. Mr. Hurtado presented his opinion verbally in relation to the claim, and was replied to by Mr. Leavenworth. The case was then submitted to the umpire for his decision, he being present at the trial."

On the 9th of March, 1862, the umpire reported his awards in several cases, among which is the case of R. W. Gibbes. The award was for \$2,500, with interest from July 26, 1826, the entire amount being \$6,952.60. The award is as follows:

"To Charles W. Davis, esquire, secretary of the joint commission of claims between the United States and New Granada.

"The umpire reports awards made in cases submitted to him as follows:

"No. 26. Brig Medea.....	\$13,695 00
Interest from November 19, 1818.....	<u>29,652 49</u>
	<u>43,347 49</u>

"No. 25. Ship Good Return.....	\$14,000 00
Interest from November 30, 1818.....	<u>30,291 78</u>
	<u>44,291 78</u>

"No. 9. John D. Danels.....	\$50,000 00
Interest from January 27, 1845.....	<u>42,787 67</u>
	<u>92,787 67</u>

Claim of R. W. Gibbes against New Granada.

" No. 80. La Constancia	\$46,373 50
Interest from January 1, 1819	100,135 00
	<hr/>
	146,508 50
	<hr/>
" No. 12. R. W. Gibbes.....	\$2,500 00
Interest from July 26, 1826.....	4,452 60
	<hr/>
	6,952 60
	<hr/>

"In the above cases interest to be taxed at 5 per cent., agreeably to the order of the commissioners.

" March 9, 1862.

(Signed)

"N. G. UPHAM."

On that day (9th of March, 1862,) the commission terminated under the limitation of time contained in the 4th article of the treaty. On the 11th of March, the board appears to have met, when the secretary was directed to prepare the certificates of awards made by the commission in favor of the claimants, in accordance with the provision of the 3d article of the treaty. On the same day (March 11th) the commissioner of New Granada filed a protest against the awards of the umpire in all the cases above mentioned, and "any responsibility accruing thereupon against the government of New Granada." On a subsequent day, the statements and arguments in this document were replied to by Mr. Leavenworth, the commissioner on the part of the United States. And, on a still subsequent day, it would seem, a statement of the umpire in reference to these protests was presented to the secretary of the board, and directed to be entered upon the journal. A certificate of the award in favor of Mr. Gibbes seems to have been prepared by the secretary on the 10th of March, 1862, and signed by the commissioner on the part of the United States on that day, but it was never signed by the commissioner on the part of New Granada, or by the umpire. This document, I understand, was and is filed in the office of the First Comptroller of the Treasury.

Payment of the amount awarded to Mr. Gibbes was suspended at the Treasury upon the request of the Secretary

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of State, and the suspension has continued in force until this time against the frequent demands and protests of the agent of the claimant. On the 10th of February, 1864, a new convention was entered into between this Government and the United States of Colombia as the representative of the late republic of New Granada, providing for the organization of a commission for the examination and adjustment of such claims as were presented to, but not settled by, the previous board. Upon the advice of Mr. Attorney-General Speed, this case of R. W. Gibbes, with the four other cases in which the umpire reported his awards on the 9th of March, 1862, were referred by your Department to the new commissioners appointed under the second convention, and the cases were entered upon their journal with the order that the question "whether this commission can take cognizance of the claims against the republic of New Granada, known as the claims of John D. Daniels, the Good Return, the Medea, the Constancia, and R. W. Gibbes, under the terms of the convention between the United States of America and the United States of Colombia, of February 10, 1864, be first considered." This question was debated by the counsel for New Granada and the counsel for claimants in the first four cases, but not, I understand, by the counsel of Mr. Gibbes. The commissioners differing in opinion on the question of jurisdiction, submitted the cases on that point to the umpire for determination. The umpire decided in favor of the jurisdiction of the board to determine the cases.

The commissioners thereupon proceeded to hear the first four cases on their merits. They were argued by the counsel of the United States of Colombia, and also by the counsel of the claimants. The commissioners differing in opinion upon the merits of the cases, they "were referred to the umpire for his decision on all points." This, it will be observed, is substantially the same form of reference to the umpire as was adopted in the case of R. W. Gibbes by the first commissioners. On the 14th of May, 1866, Mr. Carlisle, on behalf of the United States of Colombia, submitted the case of R. W. Gibbes. On the next day the umpire gave his opinion rejecting the claims in the first four of the cases commonly known as the "umpire (Upham) awards." On

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the 18th of May, the case of R. W. Gibbes being called, the following proceeding occurred: "Stricken from the calendar and docket, protest being made against the action of the board, and case not prosecuted." That is to say, the case being treated by the board as an open one against the protest of the party in interest, and not being prosecuted on the merits by him, the commissioners dismiss it. The claimants in the other cases, unlike this party, submitted to the jurisdiction of the board. They first debated the question of jurisdiction, and when that was determined against them, presented their cases for the decision of the board upon their merits. Mr. Gibbes, on the other hand, neither argued the jurisdictional question nor submitted his case on its merits to the judgment of the board. Neither by word or act, so far as the record shows, did he acquiesce in or ratify the action of our Government in submitting his case to the new commission, or the action of that body in assuming jurisdiction of it. So far as his rights against New Granada, or its representative, the United States of Colombia, under the convention of 1857, are concerned, they have not been waived either expressly or impliedly by him.

I cannot assent to the view that this Government could affect his rights as against New Granada, under the convention, by submitting his case to the second board, or that the board was able to divest those rights by any action upon the claim, under the submission of our Government, against his will and without his consent. The treaty provided that all claims on the part of citizens of the United States upon the government of New Granada, which should be presented prior to the 1st of September, 1859, either to the State Department here, or to our minister at Bogota, should be referred to a board of commissioners; that the proceedings of this board should be final and conclusive with respect to all claims before it, and its awards a full discharge to New Granada of all claims of citizens of the United States against that republic which may have accrued prior to the signature of the convention; and that the aggregate amount of the sums to be paid by virtue of their awards should be paid by the government of New Granada to the Government of the United States. Such payment to our Government

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was, of course, intended to be in trust for parties whose claims should be ratified by the board. Mr. Gibbes's claim was within the class of cases referable by the first article of the treaty to the board. It was referred. The journal of the board shows what action was taken upon it. The claimant has always contended, and now contends, that it was duly and regularly submitted to the umpire; that his decision was in form and effect a full, final, and conclusive adjudication of the claim upon the point of validity and of amount; and that the government of New Granada was bound by that adjudication, and obliged, under the stipulations of the treaty, to pay the amount thus awarded to our Government for his benefit. He further contends that he has never waived the rights, as against New Granada, which he conceives he has thus acquired by the proceedings of the commission; and that his case now stands as it did on the 9th of March, 1862, when the life of the commission terminated. I have already said that, in my opinion, he has done nothing to forfeit whatever rights accrued to him under and by virtue of the proceedings of the commission.

The only question remaining for consideration in this branch of the case is, whether his view in regard to the effect of the proceedings had by the commission in his case is correct.

The convention provided that the commissioners should select an arbitrator or umpire to decide upon any case or cases on which they might differ in opinion. There is another provision in the treaty in regard to the umpire, which may be noticed. It provided that, "in cases where they cannot agree, the subjects of difference shall be referred to the umpire, before whom each of the commissioners may be heard, and whose decision shall be final." (Art. II.) The commission was required to keep an accurate record of its proceedings. They were also required to issue certificates of the sums to be paid by virtue of their awards to the claimants. No provision is expressly made for the issuing of certificates by the umpire in cases decided by him, nor for the issuing of certificates in such cases by the commissioners. But I apprehend that the practice which I under-

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stand prevailed, whereby the commissioners certified awards in cases referred in whole or in part to the umpire, was conformable to the intendment of the treaty. This matter of the issuing of certificates seems to me, however, relatively unimportant and entirely subordinate to the main matter of inquiry, whether there was a valid award of the umpire in favor of the claimant, binding upon the government of New Granada. That must depend upon the construction and effect of those provisions in the treaty relative to the authority of the commissioners to submit cases before them to the umpire, and his jurisdiction in cases thus submitted to him, and also upon the actual character and terms of the reference made in this case to the umpire.

I am clearly of opinion that it was competent for the commissioners, in the event of a difference between them upon all questions involved in a particular case, to submit the entire case to the judgment of the umpire, and that his decision upon the whole of any such case was as final and conclusive as a decision of the commissioners upon the case could be under the terms of the treaty. The commissioners were authorized to refer any subjects of difference (*puntos de discordancia*) to the umpire, and the umpire was authorized "to decide upon any case or cases on which they might differ in opinion." If they differed upon all the subjects involved in any case, the whole case could be submitted; or, if they differed only upon a particular subject, while agreeing upon all other points, that subject was referable to the umpire, and his decision was conclusive to that extent. I do not think it was necessary, where such difference upon all the points involved in a case occurred, that the commissioners should make distinct and separate reference of these points, respectively, to the umpire, in order that he might acquire jurisdiction of them. A submission of the entire case to the arbitrator would imply or import a difference between the commissioners on all the subjects or questions involved in it, and confer upon him jurisdiction to determine the question of indemnity and of the amount to be paid the claimant, as well as all other questions arising in the case. Such a reference, I think, was entirely within the competency of the commissioners.

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In the matter of the claim of R. W. Gibbes, the record of the commission shows expressly that the "case was submitted to the umpire for his decision." Whatever question was involved in the case was, by the terms of the reference, submitted to the judgment of the umpire. He was thus authorized to pass, not merely upon the question of indemnity, but upon that of the amount to be allowed, and every other matter which could arise upon the claim; for the clear import of the record is, that the commissioners differed in opinion upon each and all of those questions, and called upon the umpire, as they had the right to do, to determine them. The record of the commission is the only evidence, in my opinion, to which we are at liberty to resort in ascertaining what jurisdiction was in fact given to the umpire. That record was authorized and required to be kept by the provisions of the treaty; and it is the official and conclusive evidence of the action of the commission. Having thus lawfully submitted to the umpire for his determination the "case" presented by Mr. Gibbes, we find that on the 9th of March, 1862, the umpire determined that case by awarding the claimant the sum of \$6,952.60. The decision was within the terms of the submission. It determined in favor of the claimant the question of indemnity, and ascertained the amount to which he was entitled. The case was submitted, and the case was determined. The award was not vacated, opened, or set aside during the lifetime of the commission, and the party has done nothing since, as I have already said, which can prevent or estop him from contending that it is a valid and conclusive ascertainment of his claim against New Granada.

Our Government, in my opinion, is entitled so to treat it under the terms of the treaty; and to ask on behalf of the claimant payment of the amount of the award from the United States of Colombia. But the question, whether the claimant is entitled to receive payment of the award at the Treasury of the United States, depends upon the provision of the 7th section of the act of February 20, 1861, (12 Stat., 145,) "to carry into effect conventions between the United States and the republics of New Granada and Costa Rica." The convention of September 10, 1857, it will be observed,

Eligibility to Office:

makes no provision for the payment by this Government of the sums awarded to the claimants by the board. It stipulates for the payment by the government of New Granada to the Government of the United States of the aggregate amount of the sums to be paid by virtue of the awards of the commissioners, (Article III.) Congress, however, by the act of 1861 to carry the treaty into effect, authorized payment to be made to claimants at the Treasury upon the *certificates of the board of commissioners* of whatsoever sums of money shall have been severally awarded them.

It seems to me that under this enactment the claimant, before being entitled to receive payment at the Treasury of the United States of the amount awarded to him, must produce a certificate in his favor of the board of commissioners. The act has not authorized the payment of an award, except on the production of this document. This document, it appears, the claimant in this case never received from the board. A certificate in his favor was made out by the clerk, was signed by the commissioner on the part of the United States, but not by the commissioner on the part of New Granada. This is the defect in his case, as presented, which will prevent, I think, the payment of the award at the Treasury, under the existing legislation. Congress can, of course, by additional legislation, authorize, if it should deem proper to do so, the payment of the amount of the award at the Treasury, notwithstanding the want of a certificate of the board of commissioners.

I have the honor to be, &c.,

E. R. HOAR.

Hon. HAMILTON FISH,
Secretary of State.

ELIGIBILITY TO OFFICE.

General E. S. Parker (an Indian) not considered disqualified from holding the office of chief of a Bureau, under the Constitution and laws of the United States.

ATTORNEY-GENERAL'S OFFICE,
April 12, 1869.

SIR In reply to your letter of the 19th instant, touching

P a t e n t E x t e n s i o n s .

the question of eligibility of General E. S. Parker to the office of chief of a Bureau of your Department, I have the honor to state that, on the facts presented, I do not perceive that he is disqualified from holding such office under the Constitution and laws of the United States.

I am, sir, with great respect, &c.,

E. R. HOAR.

Hon. J. D. Cox,

Secretary of the Interior.

P A T E N T E X T E N S I O N S .

The 18th section of the act of July 4, 1836, as modified by the 1st section of the act of May 27, 1848, conferred a very large discretion upon the Commissioner of Patents in regard to patent extensions and subjects connected therewith properly fall within the scope of his investigation upon applications for such extensions.

The patent laws having made ample provision for revising the decisions of the Commissioner, in proper cases, by the judiciary, and the Executive having no appellate power over questions arising under them, parties should be left to pursue the mode of relief there provided.

ATTORNEY-GENERAL'S OFFICE,
April 16, 1869.

SIR : I have considered the questions proposed by E. H. Smith, esq., whose communication of the 13th instant, with the accompanying papers, you were pleased to refer to me, relative to certain rules and directions promulgated by the Commissioner of Patents, concerning proceedings in his Bureau for the extension of patents.

By the 18th section of the act of July 4, 1836, (5 Stat., 124,) as modified by the 1st section of the act of May 27, 1848, (9 Stat., 231,) a very large discretion is conferred upon the Commissioner in regard to patent extensions, and under these provisions the subjects adverted to in the questions submitted might, with great propriety, be regarded as falling within the general scope of his investigation upon applications for such extensions.

But without being understood as expressing any definite conclusions of my own on this point, I may be permitted to

The Eight-hour Law.

observe that the matter presented does not appear to be one with which the President should interfere. The patent laws having made ample provision for revising the decisions of the Commissioner, in proper cases, by the judiciary, and the Executive having no appellate power over questions arising thereunder, the party should be left to pursue the mode of relief there provided. The papers are returned herewith.

I have the honor to be, &c.,

E. R. HOAR.

The PRESIDENT.

NOTE.—The acts of July 4, 1836, and May 27, 1843, cited above, are repealed by the act of July 8, 1870, chap. 230, in which is contained the existing law relating to patent extensions.

THE EIGHT-HOUR LAW.

The act of June 25, 1868, known as the eight-hour law, has nothing to do with the compensation to be paid to workmen in the navy-yards, that being still left to be determined under the provisions of the act of July 16, 1862, so as to conform, as nearly as is consistent with the public interest, with the rate of wages of private establishments in the immediate vicinity of the respective yards.

There is nothing in the latter statute requiring workmen in the navy-yards to be paid the same price for eight hours' labor which private establishments pay for ten or twelve, unless the amount of services rendered or the quality of the work make the fewer hours in the navy-yards equivalent in value to the longer time hired in private establishments, or for some other reason make it consistent with the public interest.

The conclusions of Attorney-General Evarts, in his opinion of November 25, 1868, (12 Opins., 520,) referred to and approved.

ATTORNEY-GENERAL'S OFFICE,
April 20, 1869.

SIR : I have the honor to acknowledge the receipt of your letter of April 3, 1869, in which you ask my opinion upon the true meaning and effect of the act of Congress, approved June 25, 1868, (15 Stat., 77,) which fixes the number of hours constituting a day's work of laborers, workmen, and mechanics in the employment of the United States, taken in connection with the act of July 16, 1862, (12 Stat., 587,) which provided

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"that section 8 of an act to further promote the efficiency of the Navy, approved December 21, 1861, be amended so as to read as follows: That the hours of labor and the rate of wages of the employés in the navy-yards shall conform, as nearly as is consistent with the public interest, with those of private establishments in the immediate vicinity of the respective yards, to be determined by the commandants of the navy-yards, subject to the approval and revision of the Secretary of the Navy."

In reply, I have the honor to say that the whole subject was fully considered in an opinion given by my predecessor in office, Mr. Evarts, to the President, on the 25th of November, 1868, to which I beg leave to refer you, and from the conclusions of which I see no reason to differ.

In my opinion, the statute of June 25, 1868, has nothing to do with the compensation to be paid to workmen in the navy-yards, and leaves that to be determined under the provisions of the act of July 16, 1862. The provision that eight hours shall constitute a day's labor has no tendency whatever to show whether the day's labor thus established shall be paid at a lower or higher rate than the day of ten hours labor, or at the same rate. The rate of compensation is still left by law to be determined under the rule prescribed by the statute of July 16, 1862, so as to conform, as nearly as is consistent with the public interest, with the rate of wages of private establishments in the immediate vicinity of the respective navy-yards, "to be determined by the commandants of the navy-yards, subject to the approval and revision of the Secretary of the Navy." If the private establishments in the neighborhood employed their hands for five hours a day only, there would, obviously, be no justice in reducing the wages of those employed in the navy-yards for eight hours to the amount paid by the day in private establishments, and the law intended no such result. On the other hand, I find nothing in the statute which requires you to pay the same price for eight hours' labor which private establishments pay for ten or twelve, unless the amount of service rendered or the quality of the work make the fewer hours in the navy-yards equivalent in value to the longer time hired in private establishments, or, for

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some other reason, make it consistent with the public interest.

I have the honor to be, &c.,

E. R. HOAR.

Hon. A. E. BORIE,

Secretary of the Navy.

BREVET COMMISSIONS IN THE ARMY.

Where nominations of Army officers for promotion, by brevet, had been pending before the Senate prior to the date of the act of March 1 1869, chap. 52, but were not confirmed by that body until the 3d of March, 1869: *Held* that, under the operation of the 2d section of that act, if the officers were not nominated by reason of "distinguished conduct and public service in the presence of the enemy," they could not be commissioned.

A nomination for brevet promotion, by reason of meritorious service in engagements with the Indians, is within the statute, and, consistently with its provisions, commissions might be issued to any of the officers referred to who may have been thus nominated.

Such promotion, when made during the existence of Indian hostilities, is to be viewed as conferred "in time of war," within the meaning of the act mentioned.

ATTORNEY-GENERAL'S OFFICE,

April 24, 1869.

SIR: The 2d section of the act of March 1, 1869, chap. 52, (15 Stat., 281,) entitled "An act to amend the act of April 10, 1806, for establishing rules and articles for the government of the armies of the United States," declares that thereafter "commissions by brevet shall only be conferred in time of war, and for distinguished conduct and public service in the presence of the enemy," and that "all brevet commissions shall bear date from the particular action or service for which the officer was breveted."

Two days after this law took effect, viz., on the 3d of March, 1869, the Senate confirmed the nominations of a number of officers for promotion by brevet, which had been pending before that body prior to the date of the act. Among these were some that had been made on account of services rendered in recent engagements with the Indians,

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in each of which the date of the promotion corresponded with that of the service mentioned.

The question which you submit is, "Whether, under the terms of the law cited, these latter officers are now entitled to the commissions, by brevet, heretofore intended for them, and whether, by its terms, officers not of this class are now excluded from brevet promotion."

With regard to the latter branch of this question, it is very clear that, if the officers referred to were not nominated for the brevet promotion by reason of "distinguished conduct and public service in the presence of the enemy," they cannot now be commissioned by brevet. The circumstance that their nominations were pending before the Senate prior to the date of the act does not relieve them from its operation. These nominations were not appointments. To constitute the latter, it required the issue of commissions in pursuance of the previous nominations after confirmation thereof by the Senate; but the authority to commission in these cases was, it appears, swept away by the statute, even before such confirmation was made.

It would seem, however, that the other nominations mentioned, which were made and confirmed for meritorious service in recent engagements with the Indians, are within the act; and that, consistently with its provisions, brevet commissions may be issued to the officers designated therein. The only point which suggests itself in connection with this branch of the subject is whether promotions made during Indian hostilities may be viewed as conferred "in time of war" within the meaning of the law. That Indian tribes are capable of maintaining relations of peace and war with the United States, is recognized in numerous treaties made with them; and accordingly where hostilities break out between any of those tribes and the Government, a state of war may with propriety be said to exist. Indeed such hostilities have been so described by the legislature. Thus the act of April 20, 1818, (3 Stat., 459,) made provision for the pay of militia called into service "in prosecuting the war with the Seminole tribe of Indians." So that brevet promotions made during the existence of Indian hostilities for distinguished service in the presence of the enemy are to

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be deemed as made in time of war within the meaning of the statute.

I have the honor to be, &c.,

E. R. HOAR.

Hon. JOHN A. RAWLINS,
Secretary of War.

. CASE OF REAR-ADMIRAL GOLDSBOROUGH.

It appearing that the same question which is proposed in this case was considered in the year 1867 by the then President and cabinet, including the Attorney-General, and decided by them; that the decision was adopted by the Secretary of the Navy, and has been acted upon up to the present time; that application was made for legislation to change the result announced; and that Congress has not evinced any dissatisfaction with such result, or an intention to modify it: Recommended that the decision mentioned be followed as a rule already settled, without a new inquiry into the validity of the reasons upon which it is founded.

The deliberate decision of a former administration, of a question involving private rights and interests, (no new facts being shown to exist which were not known when that decision was made,) cannot with propriety be reconsidered by its successors.

ATTORNEY-GENERAL'S OFFICE,

April 26, 1869.

SIR: I have the honor to acknowledge the receipt of your letter of the 16th of March, 1869, inclosing some papers relating to the case of Rear-Admiral Goldsborough, on which you request my decision. You say that "it is claimed by many that Rear-Admiral Goldsborough is holding his position in violation of law, and it is absolutely necessary, in order to do justice to others, that this question should be decided at once."

Upon examining the papers which you send, I find that the question whether Rear-Admiral Goldsborough is holding his position in violation of law apparently depends upon the question whether he has been in the naval service since the 11th of December, 1812, at which time a warrant as midshipman was issued to him, or only since the 1st of July, 1816, when he first reported for duty, received orders from the

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Navy Department, and became entitled to pay as a midshipman. While, as an original question, I might find at least serious reason to doubt whether he ought not to be considered in the naval service from the time when he received the warrant, which was his only appointment as a midshipman in the service, the preliminary question occurs whether this inquiry is now properly open for the consideration of any Executive Department of the Government.

It appears from the papers submitted that the same question arose in the year 1867; that in that year the Secretary of the Navy, Mr. Welles, was of the opinion that Rear-Admiral Goldsborough had been fifty-five years in the naval service of the United States, and was therefore liable to be retired from active service under the provisions of the 8th section of the act of Congress approved July 16, 1862, entitled "An act to establish and equalize the grades of line officers of the United States Navy." It further appears that a letter was addressed to Rear-Admiral Goldsborough by Mr. Welles, the Secretary of the Navy, on the 18th of June, 1867, in the following terms:

"SIR: The question of your retirement from the active list of the Navy having been submitted to the President and cabinet, it has been decided, after considering the arguments on the subject, that under a proper construction of the term 'service' contained in the 8th section of the act of July 16, 1862, your term of fifty-five years' service should be computed from the date of the first order issued to you by the Department. As the first order addressed to you bears date July 1, 1816, the term of fifty-five years will not expire until July 1, 1871. You are therefore still regarded as a rear-admiral in the Navy on the active list, the construction of law which would have placed you on the retired list from the date of this letter having been overruled."

It thus appears that the same question which you now propose for my decision was then considered by the President and the whole cabinet, including my predecessor in the office of Attorney-General, and decided by them; and that the decision was accepted and adopted by the Secretary of the Navy, and has been acted upon to the present time. In consequence of that decision, it also appears that application was made to Congress for legislation to change the re-

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sult announced in the letter quoted above, and that no action of either branch of Congress has been taken indicating dissatisfaction with the construction of law given by the Executive, or an intention to reverse or modify it.

Under these circumstances, I am of opinion that the deliberate decision of a former administration, of a question involving private rights and interests, cannot with propriety be reconsidered by its successors. No new facts are shown to exist which were not known when that decision was made. Ample opportunity has occurred for Congress, by a new provision of law, or by a declaratory act, to establish authoritatively the construction of the statute.

It was said by Mr. Wirt "to be a rule of action prescribed to itself by each administration, to consider the acts of its predecessors conclusive, as far as the Executive is concerned." (1 Opins., 9.) An adherence to this rule, which has been often restated by this Department, I consider as of great importance. Without it there would seem to be no end to the number of times in which a question might be presented for reconsideration.

I therefore recommend that the result at which the President and cabinet arrived in 1867 be followed as a rule already settled, without a new inquiry into the validity of the reasons upon which that result was reached.

I have the honor to be, &c.,

E. R. HOAR.

Hon. A. E. BORIE,

Secretary of the Navy.

STORAGE.—COMPENSATION OF NAVAL OFFICERS AND SURVEYORS.

Under the 40th section of the act of July 18, 1866, moneys received by a collector of customs from the owners of private bonded warehouses, by way of re-imbursement to the Government for the compensation of the officers in charge of such warehouses, stand upon the footing of storage in all respects, and are subject to the same disposition as other receipts falling strictly within the designation of storage.

The collector may, accordingly, retain from moneys so received in any one year, as part of his official compensation, a sum not exceeding

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\$2,000; the excess over that amount being required to be paid into the Treasury.

Statutes relating to the compensation of naval officers and surveyors of customs examined, and the following result reached: 1. That the 9th and 10th sections of the act of May 7, 1822, fix the maximum of compensation to which they are entitled, where it is derived from any or all of the sources comprehended by that act; 2, that the 5th section of the act of March 3, 1841, limits the amount which may be applied to their use where derived from rent and storage received or collected by them, but not from any other source; 3, that they become entitled to compensation out of moneys derived from the last-named source only in cases where the duty of receiving or collecting such moneys is devolved upon them, respectively, by law.

Naval officers and surveyors are not entitled to any compensation from the rents and storage received and accounted for by the collectors of the several ports.

ATTORNEY-GENERAL'S OFFICE,
April 27, 1869.

SIR: In two letters, dated respectively the 15th and 18th of December last, the Secretary of the Treasury submitted the following questions for the opinion of the Attorney-General:

1. Whether moneys received by collectors of customs, by way of re-imbursement to the United States for the pay of officers of customs in charge of private bonded warehouses, must be taken to be, to all intents and purposes, *storage*, and *disposed* of in the same manner as storage under the 5th section of the act of March 3, 1841, (5 Stat., 432;) and, if so, whether the rule of disposition shall be applied to the gross amount thus passing through the collector's hands, or to the surplus after paying therefrom the compensation of the officers in whose behalf it is so collected.

2. Whether the said section should be construed to authorize naval officers and surveyors to retain out of their fees and emoluments, without recourse to storage, \$2,000 more than the maximum fixed by the act of 1822; in other words, whether, as to them, the 9th and 10th sections of the latter act (3 Stat., 695) are repealed by the 5th section of the act of 1841 aforesaid.

3. Whether naval officers and surveyors are entitled to receive the said additional \$2,000 *from moneys arising from*

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rents and storage collected and accounted for by the collectors at their respective ports.

(1.) In regard to the first question: The whole subject respecting the rights of collectors of customs, under the act of 1841, to storage received by them, whether derived from dutiable merchandise deposited in warehouses owned or leased by the Government, or from private bonded warehouses, has been considered by the Supreme Court in the cases of *United States vs. Walker*, (22 How., 299,) and *United States vs. Macdonald*, (5 Wall., 647.)

I cannot doubt under those decisions, especially the decision in the case of *Macdonald*, and the provision of the 40th section of the act of July 18, 1866, that a collector is entitled to retain from moneys received by him by way of reimbursement to the Government for the compensation of officers in charge of private bonded warehouses, a sum not exceeding \$2,000, and that such sum may be retained by him from the gross amount of the moneys received for that purpose. If the question were to be determined alone upon the effect of the decision in the case of *United States vs. Macdonald*, there might be, perhaps, some ground for doubt whether the ruling in that case, properly considered in connection with the pleadings before the court, should be regarded as a full adjudication of the character of the moneys received by collectors from the owners of private bonded warehouses for the attendance of inspectors and of the rights of collectors in respect to those moneys. But with the 40th section of the act of July 18, 1866, in force, there can be no room for doubt that the moneys referred to stand precisely upon the footing, in all respects, of storage, and that, therefore, the collectors are entitled to retain from them an annual allowance of \$2,000. The statutory provision referred to is that "all moneys received by collectors for the custody of goods, wares, and merchandise, in bonded warehouses, shall be accounted for as storage under the provisions of the 5th section of the act of March 3, 1841," (14 Stat., 188.)

I cannot understand what was the intention of this provision, unless it was to subject these receipts to the same disposition as other receipts strictly within the designation

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of storage. By this disposition, the collector would be required to pay the excess received in any one year over \$2,000 into the Treasury of the United States, retaining the balance as part of his official compensation.

(2.) The second and third questions may be appropriately considered together.

The compensation of collectors, naval officers, and surveyors, has, from the origin of the Government, been derived chiefly from certain enumerated fees, commissions, and allowances; to which should also be added certain proportions of fines, penalties, and forfeitures. The early legislation on this subject is comprised in the following acts: July 31, 1789, (1 Stat., 29;) September [1, 1789, (*ibid.*, 55;) August 4, 1790, (*ibid.*, 145;) December 31, 1792, (*ibid.*, 287;) February 18, 1793, (*ibid.*, 305;) but these were for the most part superseded by the duty collection act of March 2, 1799, (1 Stat., 627,) and the compensation act of same date, (*ibid.*, 704.) Under these statutes, the officers aforesaid were entitled to apply to their own use the whole amount obtained by them from the sources named.

But the 3d section of the act of April 30, 1802, (2 Stat., 172,) provided that whenever the annual emoluments of a collector, after deducting therefrom the expenditures incident to his office, amounted to more than \$5,000; or those of a naval officer, after like deduction, to more than \$3,500; or those of a surveyor, after a like deduction, to more than \$3,000, the surplus should be accounted for and paid by them, respectively, to the Treasury. This act, however, is expressly declared not to extend to fines, penalties, and forfeitures under the revenue laws.

Further provisions on the subject were made by the act of May 7, 1822, (3 Stat., 693.) The 9th section of this act fixes the maximum of the annual emoluments of the collectors, naval officers, and surveyors, of certain enumerated ports, at \$4,000, \$3,000, and \$2,500, respectively, after deducting necessary office expenses, requiring the excess to be paid into the Treasury; and section 10 limits the maximum of the annual emoluments of all other collectors, naval officers, and surveyors, to \$3,000, \$2,500, and \$2,000, respectively, above their necessary office expenses, the excess to go to the

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Treasury. As in the act of 1802, these provisions are, by the 11th section, declared not to include fines, penalties, or forfeitures, or the distribution thereof.

Large additions to the free list having been subsequently made by the tariff act of July 14, 1832, and the sources of emolument to the customs officers having, in consequence, so diminished as not to yield them an adequate compensation, to supply the deficiency legislative aid was invoked, and what are known as the additional compensation acts were passed from year to year, namely, for 1833, (4 Stat., 628;) 1834, (*ibid.*, 698;) 1835, (*ibid.*, 771;) 1836, (5 Stat., 113;) 1837, (*ibid.*, 175;) 1838, (*ibid.*, 265;) 1839, (*ibid.*, 431;) 1840, (6 Stat., 815.)

By the first of these acts, collectors, naval officers, and surveyors were allowed such sum as would give those officers respectively the same compensation in that year, according to the importations of that year, which they would have been entitled to receive if the tariff act of the preceding year had not gone into effect; and this provision, with certain additions, was annually re-enacted to the year 1840, when it was made permanent. Among other additions was one introduced by the second act above mentioned, (for 1834,) requiring these officers respectively to render an account to the Treasury of all the fees and emoluments received by each in the execution of the duties of his office; a similar requirement, however, had been already imposed by the 2d section of the act of March 2, 1799, (1 Stat., 708.) The act of 1838 also contained a provision, which was made permanent by the act of 1840, that no collector, naval officer, or surveyor, should receive, respectively, more than \$4,000, \$3,000, or \$2,500 per annum. These are the maximum rates of compensation allowed to those officers by the 9th section of the act of 1822, as applicable to the enumerated ports; and inasmuch as the rates of compensation provided by the 10th section of the same act, as applicable to the non-enumerated ports, was not reproduced in the new provision, it was contended in the case of *The United States vs. Walker*, above cited, that the limit prescribed in that section was repealed; but the court held the contrary.

Thus far it plainly appears the compensation of collectors,

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naval officers, and surveyors was derived from similar sources of emolument, was in all respects regulated by the same provisions of law, and the rate thereof as regards either of those officers was still controlled by the 9th and 10th sections of the act of 1822.

We now come to the 5th section of the act of March 3, 1841. In the case of *The United States vs. Walker*, the question as to the effect of this enactment upon the prior law of May 7, 1822, was considered by the court, which held "that there is nothing in the act having the slightest tendency to show that the prior act is repealed, so far as it is applicable to the collectors of the non-enumerated ports," (22 How., 314.). Also, according to the ruling in that case, naval officers and surveyors, as well as collectors, are entitled to receive, as annual compensation for their services, *from the sources of emolument recognized and prescribed by the act of May 7, 1822*, the amount appropriated to each under the 9th and 10th sections of that act, provided their respective offices yield that amount from those sources, *but no more*. By reference to the 5th section of the act of 1841, it will be seen that, in addition to the accounts theretofore required from every collector, naval officer, and surveyor, these officers are thereafter directed to render quarterly accounts of all sums of money *by each of them respectively received or collected* for fines, &c., or for rent and storage of goods, wares, &c., beyond the rents paid by the collector or other such officer; and if from such accounting it shall appear that the money *received* in any one year by *any collector, naval officer, or surveyor*, on account of and for rents and storage as aforesaid, and for fees and emoluments, shall in the aggregate exceed \$2,000, such excess shall be paid by the said collector, naval officer, or surveyor, as the case may be, into the Treasury, &c.

In the case of *The United States vs. Walker* the court observed that every collector (and the remark is equally applicable to every naval officer and surveyor) was required to account for fees and emoluments by previous laws; and it was held that, as the account to be rendered under this act is expressly declared to be "in addition to the account now required," there is nothing left for that part of the sec-

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tion directing the payment of the excess into the Treasury to operate upon, except the sums received for rent and storage. So that the compensation to be derived by these officers under the act of 1841 must come out of the receipts from those sources, and from no other.

Each officer is required to account for such storage fees only as he has received; and, where they do not exceed \$2,000 per annum, he may retain them to his own use. But he is not legally entitled to retain what he was not legally entitled to receive. Naval officers and surveyors would be entitled to receive these fees, perhaps, while performing the duties of a collector during a vacancy caused by the disability or death of the latter, when those duties may, under certain circumstances, devolve upon them by law, (see section 22, act of March 2, 1799, 1 Stat., 641;) but only, as I can conceive, in such a case.

The results arrived at from the preceding examination of the laws relating to the compensation of naval officers and surveyors may be summed up thus: 1. That the 9th and 10th sections of the act of May 7, 1822, fix the maximum of compensation to which they are entitled, where it is derived from any or all of the sources comprehended by that act. 2. That the 5th section of the act of 1841 limits the amount which may be applied to their use where derived from rent and storage received or collected by them, but not from any other source. 3. That naval officers and surveyors become entitled to compensation out of moneys derived from the last-named sources only in cases where the duty of receiving or collecting such money's is devolved upon them respectively by law.

I am therefore of opinion, upon the second question propounded to me, that as to surveyors and naval officers the 9th and 10th sections of the act of 1822 are not repealed by the 5th section of the act of 1841, any more than as to collectors of customs; and, upon the third question submitted, that those officers are not entitled to any compensation from the rents and storage received and accounted for by the collectors at the several ports. If the officers named should be aggrieved by this construction of the statute of 1841, the subject may be readily brought to the attention of that

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department of the Government which has power to increase or diminish their compensation, as it may deem proper. I cannot advise the executive department to allow any compensation which is not plainly granted by the existing statutes.

I have the honor to be, &c.,

E. R. HOAR.

Hon. GEO. S. BOUTWELL,

Secretary of the Treasury.

NOTE.—Congress has since declared, in section 8 of the act of July 12, 1870, (16 Stat., 251,) that the 5th section of the act of March 3, 1841, referred to in the above opinion, "shall be construed to have authorized and to authorize the naval officers therein mentioned to receive the maximum compensation of \$5,000 and \$4,500, respectively, as therein named, out of any and all fees and emoluments by them received." See, as to this provision, opinions of Attorney-General Akerman, of August 1 and 17, 1870, *infra*.

COMPENSATION OF SPECIAL COUNSEL.

The provisions of the 12th section of the act of March 3, 1863, authorizing the allowance of compensation to attorneys employed to appear in behalf of revenue officers, where such compensation is certified to be reasonable and proper by the court in which the proceeding was had, and is approved by the Secretary of the Treasury, are by the 1st section of the act of July 27, 1868, made applicable to suits or proceedings against any officer or agent of the Government for any act done under color of his office during the rebellion.

ATTORNEY-GENERAL'S OFFICE,

April 28, 1869.

SIR : I have the honor to transmit herewith the accounts of Messrs. Cushing and Schley, approved by the United States district judge for Maryland, for professional services in the suit brought against Major-General Butler by Kimberly Brothers in the State court of Maryland and removed into the circuit court. These gentlemen were authorized to appear in the case, on behalf of the defendant, by the Attorney-General, as will appear by a copy of a letter of my predecessor to General Butler, of February 25, 1869, herewith inclosed.

Compensation of Special Counsel.

This account is transmitted to you for your action under the 1st section of the act of July 27, 1868, (15 Stat., 243.) By reference to this section it will be seen that the provisions of the 8th section of the act of July 28, 1866, (14 Stat., 329,) and of the 12th section of the act of 1863, (12 Stat., 741,) are thereby extended and made applicable to suits or proceedings against any officer or agent of the Government, civil or military, for acts done, &c., under color of his office or employment during the late rebellion.

The object of these several enactments was manifestly the same, viz., to protect persons in the public service against pecuniary loss arising from acts done by them while in the discharge of their public duties. By the terms of the act of 1863 the protection there provided was confined to officers of the revenue. The act of 1866 extended this protection to officers and others acting under authority or color of the acts of March 12, 1863, and July 2, 1864, relating to captured and abandoned property, &c. The act of 1868 goes still further, and brings within the same protection *all* officers and agents of the Government, *civil or military*, proceeded against for acts done by them during the period and in the manner therein described. The 12th section of the act of 1863 authorizes the allowance of compensation to attorneys employed to appear in behalf of revenue officers where such compensation is certified to be reasonable and proper by the court in which the proceeding was had and is approved by the Secretary of the Treasury; and it also provides for the payment of judgments recovered against these officers, upon certain conditions, out of the "proper appropriation" from the Treasury. This provision is, by the 1st section of the act of 1868, made applicable to suits or proceedings against any officer or agent of the Government for any act done under color of his office during the rebellion; and applies to the subject of the compensation of counsel employed in the present case.

I may say, in regard to the expenses of counsel for printing, &c., which are charged in the account, that I understand from Mr. Schley, a distinguished practitioner in Maryland, that the courts in which the case was tried expect, in cases of such importance, that the counsel will prepare and furnish printed briefs, and that the briefs, for the printing of which

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charge is made, were prepared and printed in conformity with the usage of the profession in such cases.

I have the honor to be, &c.,

E. R. HOAR.

Hon. GEO. S. BOUTWELL,
Secretary of the Treasury.

CASE OF VIRGIL S. EGGLESTON.

The right of an individual to an office in the Army to which he has been nominated and confirmed is not a vested one until his commission has been signed by the President.

Until the commission has been signed, it is within the discretionary power of the President to withhold it.

ATTORNEY-GENERAL'S OFFICE,
May 8, 1869.

SIR : I have received your letter of the 22d of March last, requesting my opinion upon the question of the legal right of Virgil S. Eggleston to be commissioned a paymaster of the Army of the United States. The facts, as stated in your letter, and in the inclosures transmitted with it, I understand to be as follows:

On the 22d of February last, by direction of the President, Paymaster-General Benjamin W. Brice was retired from active service, and on the same day Assistant Paymaster-General Nathan W. Brown was nominated to be Paymaster-General, *vice* Brice, retired; Deputy Paymaster-General Hiram Leonard to be Assistant Paymaster-General, *vice* Brown, promoted; Paymaster Benjamin Alvord to be Deputy Paymaster-General, *vice* Leonard, promoted; and Virgil S. Eggleston, of New York, to be paymaster, *vice* Alvord, promoted. On the 5th of March last, by direction of the President, the order placing Paymaster-General Brice upon the retired list was revoked, and he was to be considered as on duty as Paymaster-General from February 22d last, the date of his retirement. On the same 5th day of March certain confirmation rolls were received from the Senate of the United States, by which it appeared that on the 3d day of March last the Senate advised and consented to the appointment of Eggleston to be a pay-

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master in the Army. The nominations of the other persons hereinbefore named were not consented to by the Senate.

It does not distinctly appear from your letter whether these nominations were not acted upon by the Senate or were rejected; but I infer that they were not acted upon. No commission has been issued to Eggleston; and there was and is no vacancy in the office of paymaster, unless the nomination by the President of Alvord to be Deputy Paymaster-General created a vacancy. This nomination of Alvord was made to the Senate during its session, but was not consented to by the Senate, and of course no commission has been issued to him.

By the 5th section of the act of July 13, 1866, (14 Stat., 92,) it is, among other things, enacted that no officer in the military or naval service shall, in time of peace, be dismissed from service, except upon and in pursuance of the sentence of a court-martial to that effect, or in commutation thereof. Alvord was not, then, removed from the office of paymaster, unless he was appointed Deputy Paymaster-General, and had accepted the appointment; and he was not so appointed, because he had only been nominated by the President during the session of the Senate, the Senate had not advised and consented thereto, and no commission had been issued; all of which are necessary to make a complete appointment.

Even if there had been a vacancy in the office of paymaster to which Eggleston could have been legally appointed, still the right of Eggleston to the office is not a vested one until his commission has been signed by the President. Until a commission has been signed, it is within the discretionary power of the President to withhold it. (Opin. of Attorney-General Nelson in the case of Lieutenant Cox, 4 Opins., 217; Opin. of Attorney-General Black in Hughes's case, 9 Opins., 297; Opin. of Attorney-General Cushing on Duration of Commissions, 6 Opins., 87.)

I have the honor to be, &c.,

E. R. HOAR.

Hon. JOHN A. RAWLINS,
Secretary of War.

Authority Concerning Public Property.

AUTHORITY CONCERNING PUBLIC PROPERTY.

The Secretary of War cannot grant or convey any interest in land belonging to the United States, except in pursuance of an act of Congress expressly or impliedly authorizing him to do so.

ATTORNEY GENERAL'S OFFICE,

May 13, 1869.

SIR: I have the honor to acknowledge the receipt of your communication of the 24th ultimo, in which you request my opinion "upon the question whether any authority is vested in the executive branch of the Government to lease or otherwise dispose of a usufructuary interest in public property of the United States without prior legislative sanction," and you state that this question is pertinent to the consideration of an application for an abatement of the stipulated rent of the Government farm at Fort Delaware, which for many years has been held by private persons under a lease from the Department of War.

I am clearly of the opinion that the Secretary of War cannot convey to any person any interest in land belonging to the United States, except in pursuance of an act of Congress expressly or impliedly authorizing him to do so.

I have the honor to be, &c.,

E. R. HOAR.

Hon. JOHN A. RAWLINS,

Secretary of War.

CASE OF THE AMOSKEAG COMPANY.

In this case, (which relates to a contract for arms, by the terms whereof the War Department agreed to purchase, at a stated price, all the carbines which the contractor could make in six months, not to exceed six thousand, to be inspected, approved, and delivered, as provided in the agreement,) upon the facts submitted, the United States are not considered legally bound to accept the arms and pay for them, or to pay damages for not accepting them.

ATTORNEY GENERAL'S OFFICE,

May 15, 1869.

SIR: The claim of the Amoskeag Arms Company was, on

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the 28th of October, 1867, by the President of the United States, referred to this office for an opinion; and by a letter of January 7th last, Mr. Evarts, then Attorney-General, requested that the facts might, if possible, be agreed between the Secretary of War and the company. Certain facts have been agreed, and sent to this office by the late Secretary of War, inclosed with his letter of the 1st of February last. These facts are as follows:

“ 1. On the 26th of February, 1863, Edward Lindner, patentee of the Lindner carbine, made a written application to General Ripley, then Chief of Ordnance in the War Department, for an order to furnish a quantity of his carbines, as shown per his letter appended hereto marked ‘A.’

“ 2. On the 13th of April following, General Ripley, by authority of the War Department, gave said Lindner an order for all the carbines he could make in six months, not exceeding six thousand, as per letter dated April 13, 1863, appended hereto marked ‘B.’

“ 3. On the 17th of the same month, said Lindner addressed a letter to General Ripley, accepting said order, as per his letter dated April 17, 1863, marked ‘C.’

“ These papers, ‘A’ ‘B,’ and ‘C,’ constitute the original grounds upon which this claim is founded.

“ It was understood that the Amoskeag Company were to fabricate the arms at their works at Manchester, N. H., said company having made the five hundred carbines previously furnished, to which reference is made in the above-named papers marked ‘A’ and ‘B.’

“ 4. Major Hagner, an officer of the Ordnance Department, whose special duty it was to oversee the manufacture of contract arms, and to inspect them, was immediately informed by General Ripley of the order to Mr. Lindner, as letter hereto appended marked ‘D.’

“ On receipt of the foregoing order, the Amoskeag Company commenced preparations to fabricate the arms, and purchase certain tools and fixtures especially adapted to the fabrication of the carbines as ordered with the changes immediately hereafter referred to; the company having on hand a portion of the machinery for their fabrication.

“ 5. On the 23d of April, 1863, General Ripley, Chief of

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Ordnance, addressed a letter to Mr. Lindner, requesting certain changes to be made in the construction of said carbines, as per letter hereto appended marked 'E.'

"6. When about the six months limited in the order for the completion of the contract expired, (viz., in November, 1863,) the carbines were not finished and ready for inspection; but parts were in progress, and some of them were approaching completion.

"No notice was then, or ever, given to the contractors not to proceed with the work, or that objection would be made that the arms were not furnished in the six months limited in the order. Major Hagner, inspector of contract arms, was occasionally at the company's works, and knew of the progress of the work.

"7. On or about the 5th of April, 1864, Hon. E. A. Straw, agent of said Amoskeag Company, called on the Chief of Ordnance at the War Department, and exhibited a finished carbine as a specimen of the six thousand carbines the Amoskeag Company had in progress of fabrication under the aforesaid order, and represented that all the six thousand carbines were then so far advanced as to be ready for delivery to the inspectors as fast as they could receive and inspect them, and asked that they be then inspected and received by the Department, which was not then or since ordered, and was not then and has not since been done.

"8. Inspection of contract arms is always at the place of manufacture, and is made of the parts of arms before they are assembled, and again of the complete arm after the parts are put together.

"9. Arms are said to be ready for inspection, and it is the common practice for contractors to call for inspectors and for the Department to furnish them when the parts of the arms are so far advanced that they can be finished and furnished to the inspectors as fast as they can receive and inspect them in the ordinary course of inspection. Such is the usual course of proceeding in cases of contract arms.

"10. The changes in the construction of the arms required by the Chief of Ordnance were made by the contractors, and these changes necessitated other changes to make the parts conform, and alterations in the machinery, and new tools and fixtures to perform the work.

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"Other changes were made in the construction of the arm by the contractors on their own motion, which were important and judicious, and materially improved the arm.

"Precisely how much time these changes required is not agreed; but it is admitted by the Department that they necessarily required at least two or three months, a part of which resulted from the action of the Department, and that the contractors proceeded in good faith and without unnecessary delay.

"11. Before the expiration of six months from the date of the order to Lindner, it was reported to the contractors from the Ordnance Bureau that it was rumored that the five hundred carbines previously furnished had proved unsatisfactory in service, and the contractors made what effort they could to ascertain in what particulars, if any, said carbines were defective, in order to remedy the evil in those then in process of construction. The rumor proved unfounded, but the work was hindered and delayed thereby.

"12. From July, 1863, to April, 1865, the Government constantly had inspectors at the company's works at Manchester under the direction of Major Hagner, inspecting muskets made by said company for the Government. The precise time when said six thousand carbines were finished and assembled is not agreed, but it is admitted and agreed that said carbines were so finished in May, 1865, and that said Amoskeag Company then had said carbines at the place of their manufacture in Manchester, New Hampshire.

"13. In many cases of contract arms there have been renewals and extensions of time.

"14. Reports embracing facts of this case, then and now claimed and admitted by the Ordnance Bureau, as per papers hereto appended, marked F, G, H, I, and K, have been made to the War Department."

Paper marked A is as follows:

"WASHINGTON, D. C., February 25, 1863.

"GENERAL: During the month of October last, Senator Hale and myself had the honor of waiting upon you in regard to my breech-loading carbines; and in answer to the question whether an order for 10,000 pieces could be granted

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to me, you had the goodness to state that it would be necessary to furnish first the 500 carbines already contracted for with me. These 500 pieces have been delivered to Major Hagner at New York a short time since, and every one of which was, after a severe and minute inspection and trial, found in every respect to be perfect by that officer of ordnance. Under these circumstances I beg the liberty to renew my application for an order of from five to ten thousand pieces, together with the necessary cartridges. Price of carbines, \$20 a piece. Price of cartridges, \$22 per thousand. We are prepared—we, that is to say, the Amoskeag Company—to manufacture for delivery 1,000 pieces per month, and I beg to repeat a statement made in a former letter, that my carbines are superior to any so far introduced, a fact which has been officially acknowledged and known at home and abroad.

"Awaiting your kind reply, general, to the foregoing, I have the honor to be, with high regard,

"Your obedient servant,

"EDWARD LINDNER,

"426 Eleventh Street.

"General RIPLEY,

"Ordnance Department, &c., &c., &c."

Paper B is as follows:

"ORDNANCE OFFICE, WAR DEPARTMENT,

"Washington, D. C., April 13, 1863.

"SIR: Your letter of the 25th of February, 1863, applying for an order for an additional number of your carbines at \$20 each, and offering to furnish cartridges for the same at \$22 per M, was submitted to the War Department.

"By authority of that Department, I now give you an order for all the carbines that you can make in six months from this date, not to exceed six thousand, to be of the same kind as the five hundred (500) carbines you delivered to Major Hagner, and to be inspected and approved by him. For each carbine so delivered and accepted, you will be paid twenty dollars, (\$20.) Two hundred cartridges will be required for each carbine received from you, to be paid for at twenty-two dollars (\$22) per thousand.

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"Please signify your acceptance or non-acceptance of this order.

"Respectfully, your obedient servant,

"JAMES W. RIPLEY,

"*Brig.-General, Chief of Ordnance.*

"Mr. E. LINDNER,

"*426 Eleventh Street, Washington, D. C.*"

Paper C is as follows:

"WASHINGTON, April 17, 1863.

"GENERAL: I have the honor to acknowledge the receipt of your communication dated the 13th instant, tendering me an order for all the carbines (Lindner carbine) which I can make in six months from the date of your letter, not to exceed six thousand, and to be the same as the five hundred delivered to Major Hagner, &c. The Department further desires 200 cartridges for each carbine at \$22 per thousand. This order I have the power to accept under the conditions above stated, and beg leave to express my thanks for the same.

"Trusting the Department will increase this order, I have the honor, general, to be, with high regard,

"Your obedient servant,

"EDWARD LINDNER,

"*426 11th Street.*

"Brigadier-General JAMES B. RIPLEY,

"*Chief of Ordnance.*"

Paper D is as follows:

"ORDNANCE OFFICE, WAR DEPARTMENT,

"Washington, April 17, 1863.

"SIR: Mr. E. Lindner having accepted an offer from this Department to furnish Lindner carbines, a copy of the order is herewith inclosed for your information and guidance.

"Respectfully, your obedient servant,

"JAMES W. RIPLEY,

"*Brigadier-General, Chief of Ordnance.*

"Major P. V. HAGNER,

"*77 East 14th Street, New York.*"

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Paper E is as follows:

“ORDNANCE OFFICE, WAR DEPARTMENT,
“Washington, April 23, 1863.

“SIR : The following extract is taken from a letter of Major Hagner, the inspector of contract arms, viz : ‘I think Lindner’s carbines, under the new order, should have the hind-sight made for three elevations and be placed in front of the receiver ; it is now too close to the eye. The lock-plate should be slightly changed in front of the cone-seat, so as to have the metal protect the wood ; it is liable to be easily split at present.’

“Please report whether these changes can be made without additional cost to the arm. If so, let the change be made at once.

“Respectfully, your obedient servant,
“JAMES W. RIPLEY,
“Brigadier-General, Chief of Ordnance.

“Mr. E. LINDNER,
“Care of Amoskeag Company,
“Manchester, New Hampshire.”

These papers, “A,” “B,” “C,” “D,” and “E,” are made part of the agreed statement of facts.

The papers marked “F,” “G,” “H,” “I,” and “K,” it is agreed, as I understand, were written and signed by the persons by whom they purport to be written and signed, and sent to the persons to whom they purport to be addressed, at their respective dates, and were received by the persons to whom they were addressed ; but it is not agreed that the facts stated in them are true. These papers are “F,” a report from General Dyer, Chief of Ordnance, to the Secretary of War, dated January 31, 1865 ; “G,” a report from General Dyer, Chief of Ordnance, to the Secretary of War, dated January 24, 1867 ; “H,” a report from General Dyer, Chief of Ordnance, dated May 30, 1867, not expressly addressed to any person, but supposed to have been made to the Secretary of War ; “I,” an opinion of Judge Advocate-General Holt, to the Secretary of War *ad interim*, dated September 12, 1867 ; “K,” a letter from Brevet-Colonel Crispin, Major of Ordnance, to General Dyer, Chief of Ordnance, dated May 23,

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1867. These papers, "F," "G," "H," "I," and "K," seem to me immaterial, and they are not set out. Lindner, it seems, acted in behalf of the company, and his letters and acts are regarded as the letters and acts of the company.

My opinion is requested whether, as a question of law, the United States are bound to receive and pay for these arms, either the agreed price or their value, or to pay damages for not accepting them. The United States have not accepted them, and their liability, if any exists, rests upon express contract. That contract, so far as the carbines are concerned, which alone are the subject-matter of the claim, is, that the United States will receive all the carbines the company can make in six months from April 13, 1863, not to exceed six thousand, the carbines to be of the same kind as five hundred carbines previously delivered to Major Hagner, and to be inspected and approved by him; and for each carbine so delivered and accepted the United States will pay twenty dollars. Ten days after the date of the letter giving the order to the company, and six days after this order was accepted, letter "E" was sent, which requests Lindner to report whether certain changes can be made in the construction of the arms, "without additional cost to the arm;" and, if so, to let the changes be made at once.

To this letter "E" it is not stated that any reply was sent, but it is agreed that the changes suggested in it "were made by the contractors, and that these changes necessitated other changes to make the parts conform, and alterations in the machinery, and new tools and fixtures to perform the work," and required some time. The company proceeded to manufacture the arms in good faith, and without unnecessary delay.

Before the expiration of the six months, a rumor was reported to the contractors that the five hundred carbines previously furnished had proved unsatisfactory; and the contractors made what efforts they could to ascertain the truth of the rumor. This rumor proved unfounded, but the manufacture of the arms was hindered and delayed thereby. At the expiration of the six months not a single carbine was finished and ready to be inspected, and it is not agreed that any were so finished before May, 1865.

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No notice was given to the company not to proceed with the work, or that objection would be made that the arms were not finished within the six months named in the order, until a finished arm was exhibited by Mr. Straw, an agent of the company, on the 5th of April, 1864, as a specimen. Mr. Straw then represented that all of the six thousand carbines were then so far advanced as to be ready for delivery to the inspectors as fast as they could receive and inspect them. Major Hagner was occasionally at the company's works, and knew of the progress of the work; but it does not distinctly appear that any notice was given to the Chief of Ordnance or the War Department that the company was proceeding with the work after the expiration of the six months. That *time* was of the essence of this contract originally, is manifest. This limitation of six months also determined the number of the arms which the United States were bound to receive. It was not a contract for six thousand arms to be delivered within six months, and to be inspected and approved by Major Hagner, by which the company would have been bound to furnish the full number of six thousand within the time limited. The arms were not in existence at the date of the order, and the company did not expressly bind itself to manufacture any within six months. I am not certain that there was any legal obligation on the part of the company to manufacture any arms. But if the company was bound to proceed with the manufacture in good faith and with reasonable diligence, still the number of arms which the United States were bound to take was to be determined by the event. When the six months had expired, all arms manufactured, not exceeding six thousand, of the pattern contracted for, and inspected and approved by Major Hagner, the United States were bound to take.

It is contended for the company that the request of April 23, to make certain changes, if they could be made "without additional cost to the arm," inasmuch as to make these changes required additional time, was a waiver of the limitation of six months, and that by this and the other facts stated, the original contract became a contract to make and take absolutely six thousand arms of the pattern

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ordered, with the changes requested, to be delivered within a reasonable time. If the contract had been originally to make and take just six thousand arms, to be delivered within six months, it may be that a request by the United States for changes which required additional time, and to make which was known, or might have been known, by the officers who requested them to be made, to require time, (such officers having authority to make the request,) would, if such request were acceded to by the contractors, waive the limitation. But, in the actual case, it is very plain that the Department of War meant to confine the changes of construction to such changes as would not increase the cost of the arm, and to still adhere to the contract in every other respect, and to bind itself to receive only so many arms as should be manufactured within six months. At the expiration of six months, none having been manufactured, inspected, and accepted by Major Hagner, by the express terms of the contract there was none for the Department to receive.

It will not be contended that the mere communication of a rumor that the five hundred arms previously furnished had proved unsatisfactory would be a waiver of anything, or that the fact that there had been renewals of, and extensions of time in, other contracts, has anything to do with this contract; nor were the United States bound to give notice at the end of six months that they would stand on the terms of their contract. Such a notice may be requisite in cases where the labor expended and materials used by one contractor are necessarily beneficial to the other contractor, as in the case of labor expended and materials used in erecting buildings on the land of such contractor, and in other similar cases, in which it is held that one cannot lie by and receive the benefit without incurring a corresponding obligation. But in the case of the manufacture of personal chattels, the property in which remains in the manufacturer until they are completed and delivered, there is no rule of law that requires such notice. These considerations seem to me to be uncontrolled by the remaining facts, and to be decisive. In my opinion the United States are not legally

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bound to accept the arms and pay for them, or to pay damages for not accepting them.

I have the honor to be, &c.,

E. R. HOAR.

Hon. JOHN A. RAWLINS,
Secretary of War.

NATIONAL BANKING ASSOCIATIONS.

It is not within the power of a State legislature to alter, modify, add to, or diminish the powers, duties, or liabilities created in or conferred upon banking associations established under a law of the United States.

Such associations cannot be merged or in any manner identified with similar corporations created by State legislation, without the authority of Congress.

The dissolution of a national banking association is not complete until the necessary action has been had for the redemption of its circulating notes, either by actually redeeming them and surrendering them to the Comptroller of the Currency, or by depositing an amount of Treasury notes with him adequate to their redemption.

The obligations, duties, and liabilities of such association, before the completion of the acts necessary to its dissolution, stated.

The remedies given by the national banking law for a violation of its provisions may be pursued by the Comptroller of the Currency.

ATTORNEY-GENERAL'S OFFICE,
May 15, 1869.

SIR: In your letter of April 6, 1869, transmitting a copy of a letter from the Comptroller of the Currency of the same date calling attention to his letter of October 15, 1868, and referring to a letter of the late Secretary of the Treasury to my predecessor of October 16, 1868, you request my advice upon the points presented therewith, which have been carefully considered, and upon which I am now prepared to submit my opinion.

The Comptroller states, in his letter of April 6 last, that he is "informed, and has reason to believe, that quite a number of national banks in the city and State of New York, in order to avoid the restrictions and limitations imposed by the act of Congress, contemplate a return to the State system, under what they call the 'enabling act,'

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passed by the legislature of that State for that purpose." And in his letter of October 15, 1868, he states that "The president and directors of the National Mechanics' and Farmers' Bank of Albany, an institution organized under the act of Congress 'to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof,' passed June 3, 1864, claim to have converted their bank into a State banking association, under the provisions of an act passed by the legislature of the State of New York April 20, 1867, entitled 'An act enabling national banking associations to become State banking associations,' &c., and that by virtue of such conversion they are absolved from all allegiance and responsibility as a national bank to this office, and to the requirements of the act of Congress."

I am of the opinion that it is not within the power of the legislature of New York to alter, modify, add to, or diminish the powers, duties, or liabilities created in or conferred upon a banking association established under an act of Congress. The powers, privileges, and duties of a corporate body are wholly derived from the sovereignty which gave it existence. The legislature of New York may undoubtedly incorporate or provide by law for the incorporation of banking associations in that State. But banking associations thus created are new and distinct bodies corporate, with which corporations deriving their existence from the United States cannot be merged, or in any manner identified, without the authority of Congress. Any lawful contract which a national banking association might make with a private person, or with another corporation, may undoubtedly be made with a corporation established by the State of New York for banking purposes, and authorized by that State to enter into such a contract. On the dissolution of a national banking association in the manner provided by the laws of the United States, the property of such an association may be disposed of by its owners to any other parties competent by the local law to receive such transfer, so far as the restrictions, liabilities, and duties imposed by act of Congress upon the corporation winding up its affairs will admit. But it seems to me that it is a misuse of language to say that the

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national banking association is in any sense changed into the banking corporation created by the laws of the State, or merged in it; and I can perceive no power or authority existing in the legislature of the State of New York by which the property of the national corporation shall, "by act of law, and without any conveyance or transfer, be vested in and become the property of such State banking association." The statute of New York may, indeed, provide for the creation of a corporation clothed with the capacity to receive a transfer of property in such manner as the legislature of that State may determine, and, as far as its capacity to receive is concerned, the legislature of that State has full control over the subject. But the creation of the capacity in the new corporation is an entirely different thing from the attempt to transfer from the national corporation its property. The powers and mode of action of the national corporation depend wholly upon the action of the national legislature.

I am further of opinion that when a national banking association has taken the proper measures for its own dissolution in conformity with its articles of association, and under the provisions of the act of Congress of June 3, 1864, (13 Stat., 99,) such dissolution is not complete until the necessary action has been had for the redemption of its circulating notes, either by actually redeeming them and surrendering them to the Comptroller of the Currency, or by depositing an amount of Treasury notes with him adequate to their redemption, as provided by that act; and that until these acts are completed, the existence of the national banking association continues under the law; that its capital cannot be lawfully distributed among its shareholders, or transferred to any other person or body corporate; that it remains under the supervision of the Comptroller of the Currency in the manner and to the extent prescribed by the act of Congress to the same extent as before its liquidation commenced; that it is still required to make regular and proper reports and returns of its condition to the Comptroller in the manner prescribed by the statute; that it is subject to the penalties which the statute provides for a failure to make such returns; that its obliga-

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tion to keep its reserve of lawful money still continues; that its directors must still be the owners of so much of its capital stock as the statute directs, and that it is unlawful to impair the lien of the United States upon its assets by a transfer of them without other consideration than the formation of a new banking association by the same stockholders. It follows as a consequence that whatever remedies the act of Congress gives for a violation of its provisions may be pursued by the Comptroller of the Currency. Whether such remedy is to be found in obtaining a decree of forfeiture and appointment of a receiver by the exaction and collection of penalties, or by an injunction from a court of equity to restrain acts from which loss or danger to the rights of the United States may be reasonably apprehended, will depend, of course, upon the special facts of the case, and upon the nature and extent of the violations of its corporate duty, which the national banking association undertaking to dissolve its corporate existence and liquidate its affairs may be found to commit.

I return herewith the papers transmitted.

I have the honor to be, &c.,

E. R. HOAR.

Hon. GEO. S. BOUTWELL,
Secretary of the Treasury.

CASE OF JAMES WEAVER.—RECONSTRUCTION LAWS.

In September, 1868, J. W., a citizen of Texas, not in the military or naval service of the United States, while under indictment in a court of that State, and under arrest to await trial therein for murder, was brought before a military commission at Austin, Texas, appointed by the commanding general of the fifth military district, under section 3 of the reconstruction act of March 2, 1867, chap. 153, and was there tried for the same murder, found guilty, and sentenced to be hanged: *Held* that, by virtue of the provisions of said act, and in view of the peculiar political relations then existing between the State of Texas and the United States, and of other circumstances presented in the case, the jurisdiction of the military commission was complete, and that there is no legal obstacle to the execution of the sentence.

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The constitutionality and validity of the provisions of the act of March 2, 1867, adverted to above, considered and affirmed.

ATTORNEY-GENERAL'S OFFICE,

May 31, 1869.

SIR: Your letter of March 24, 1869, submitting for my opinion, "as to the proper action to be had in the premises, the case of James Weaver, a citizen of Texas, who was tried before a military commission appointed by the commanding general of the fifth military district, under authority of section 3 of the act of March 2, 1867, (14 Stat., 428,) to provide for the more efficient government of the rebel States, and found guilty of murder, and sentenced to be hanged," the record having been forwarded for the action of the President, as required by section 4 of said act, and returned by him to your Department upon the 1st day of February last, without any action upon the same, was received on the 26th of March last. The grave importance of the question involved required such careful and deliberate consideration that, under the pressure of other official duties, I have not been able until this time to give it sufficient attention. Having now carefully examined it, I proceed to state the conclusion to which I have arrived.

From the papers accompanying your letter it appears that James Weaver, a citizen of Bastrop County, Texas, was indicted for murder in that county. By request of J. J. Thornton, district judge of the second district of Texas, made to General Reynolds, the commander of the fifth military district, accompanied by a statement that a trial could not probably be had in the State courts, and asking that he may be tried by the military authorities, a military commission was organized at Austin, Texas, before which, on the 17th of September, 1868, and days following, Weaver was arraigned and tried. He was defended by counsel, was found guilty, and sentenced to be hanged. And the question on which you desire my opinion seems to be this: Whether the general commanding the fifth military district had authority to take a man from the civil power and try him by military law; or, in other words, whether a military commission in Texas, in September, 1868, had jurisdiction over a citizen not in the naval or military service, charged

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with the murder of another citizen, and under indictment and arrest in the State courts therefor? From the letter of Judge Thornton to General Reynolds, above referred to, which is made a part of the record in the case, it appears that Weaver was under indictment in the district court for the second judicial district of Texas for murder, and that the civil courts were so badly situated and managed that, if left with them, no trial could probably be had.

Exceptions to the jurisdiction of the commission were filed by Weaver, who objected, first, that he was entitled to a trial by jury; secondly, that the Constitution of the United States provides that no person shall be twice put in jeopardy of life or limb for the same offense; that the offense with which he was charged belonged entirely to the civil courts of the State of Texas, and that he would be unable to plead the finding of the commission in bar in the district court in Bastrop County; thirdly, that before the date of the order convening the commission he was under indictment in the civil court, and was under arrest to await trial therein, and that the said indictment for the same offense was still pending against him; fourthly, because the district court of Bastrop County was fully organized and prepared to pass upon all cases brought before it; fifthly, because he, the said Weaver, was a citizen not connected with the Army of the United States, and the deceased was also a citizen. These exceptions were overruled by the commission.

The statute of March 2, 1867, entitled "An act to provide for the more efficient government of the rebel States," declares in its preamble that no legal State governments or adequate protection for life or property then existed in the rebel States therein enumerated, including among them the State of Texas; and that it was necessary that peace and good order should be enforced in said States until loyal and republican State governments could be legally established. It therefore enacted that said rebel States should be divided into military districts, and made subject to the military authority of the United States, as thereafter prescribed; and that it should be the duty of the President to assign to the command of each of said districts an officer of the Army,

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and to detail a sufficient military force to enable such officer to perform his duties and enforce his authority in the district to which he was assigned.

The third and fourth sections of said act are as follows:

"SEC. 3. And be it further enacted, That it shall be the duty of each officer assigned as aforesaid, to protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence, and to punish, or cause to be punished, all disturbers of the public peace and criminals, and to this end he may allow local civil tribunals to take jurisdiction of and to try offenders, or, when in his judgment it may be necessary for the trial of offenders, he shall have power to organize military commissions or tribunals for that purpose, and all interference under color of State authority with the exercise of military authority under this act shall be null and void.

"SEC. 4. And be it further enacted, That all persons put under military arrest by virtue of this act shall be tried without unnecessary delay, and no cruel or unusual punishment shall be inflicted, and no sentence of any military commission or tribunal hereby authorized, affecting the life or liberty of any person, shall be executed until it is approved by the officer in command of the district, and the laws and regulations for the government of the Army shall not be affected by this act, except in so far as they conflict with its provisions: *Provided*, That no sentence of death under the provisions of this act shall be carried into effect without the approval of the President."

The act also provided that its provisions should become inoperative when the States had adopted constitutions approved by Congress, and Senators and Representatives were admitted therefrom, and that, until the people of said States should be by law admitted to representation in Congress, any civil governments which may exist therein shall be deemed provisional only, and in all respects subject to the paramount authority of the United States at any time to abolish, modify, control, or supersede the same. As the State of Texas had not in September, 1868, and has not since, adopted a constitution in conformity with the provisions of the act, and has not become entitled to representation in the Congress of the

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United States, the act was operative in Texas at the time the military commission was organized for the trial of Weaver, and the commanding general exercised the discretion intrusted to him by the 3d section, by deciding that it was necessary for the trial of an offender to organize a military commission for that purpose. If, therefore, this statute of March 2, 1867, is a constitutional and valid statute, it then appears that the jurisdiction of the military commission was complete, and that there is no legal obstacle to the execution of its sentence.

It is obvious, in the first place, that, under the Constitution of the United States, Congress has no power to subject any citizen of a State to trial and punishment by military power in time of peace. But the power to declare war is, by the Constitution, expressly vested in Congress. It has, also, power to suppress insurrection, and to make all laws necessary and proper for carrying into execution all the powers vested by the Constitution in the Government of the United States, or in any department or officer thereof. The power to declare war undoubtedly includes, not only the right to commence a war, but to recognize its existence when commenced by others; to declare that there is a war, and therupon to make provision for waging war; to determine, so far as the nation can assert and enforce its will, how long the war shall continue, and when peace is restored.

The Constitution has made no provision in terms for a rebellion of the magnitude of that which has occurred, involving the destruction of all the legitimate and constitutional governments in whole States of the Union, and involving a war between those States and the National Government. But the Constitution is a frame of government, and clearly implies the endowment of that government with all power necessary to maintain its own existence and to the vindication of its authority within the scope of its appropriate functions.

When war was waged upon the United States by States of the Union as organized communities, Congress could and must recognize the existence of that war, and apply itself, by the means belonging to war, to the vindication of the national authority, the preservation of the national territory, and the

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restoration of a republican government under the national Constitution, in each of the rebellious States. As was said by the Supreme Court in the *Prize Cases*, (2 Black, 673,) "it is a proposition never doubted that the belligerent party who claims to be sovereign may exercise both belligerent and sovereign rights." The territory possessed by the rebels might lawfully and constitutionally be treated by the United States as enemy's territory. In the language of the court in the same case, "all persons residing within this territory whose property may be used to increase the revenues of the hostile power, are, in this contest, liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their Government, and are none the less enemies because they are traitors."

Where all lawful governments have been extinguished by the rebellion on the theater of active military operations, where war really prevailed, there is a necessity to furnish a substitute for the civil authorities thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. The right to govern by military law under such circumstances was fully conceded in the opinion of the Supreme Court of the United States in *Ex parte Milligan*, (4 Wall., 127.) The test is there suggested that the right to govern by military power depends upon the fact that the courts are actually closed, and that it is impossible to administer criminal justice according to law. But while the war continues, although the military power may be the only government in the territory held by force of arms, the military commander may make use of such local tribunals already existing as he may find it convenient to employ in subjection to his paramount authority.

It then remains to consider, first, whether the State of Texas has been, during the rebellion, so deprived of all constitutional and lawful government as a State, and so in armed hostility to the Government of the United States, as to be subject to military law when possession of her territory was regained by the military power of the United States; and, secondly, whether the right to hold and govern the State by military power has terminated.

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To the first question there can be but one answer. In the language of Chief Justice Chase, in *Texas vs. White et al.*, decided at the present term of the Supreme Court, "no one has been bold enough to contend that, while Texas has been controlled by a government hostile to the United States and in affiliation with a hostile confederation waging war upon the United States, Senators chosen by her legislature, or Representatives elected by her citizens, were entitled to seats in Congress, or that any suit instituted in her name would be entertained in this court. All admit that, during this condition of civil war, the rights of the State as a member, and of her people as citizens, of the Union, were suspended. The government and the citizens of the State refusing to recognize their constitutional obligations assumed the character of enemies, and incurred the consequences of rebellion."

The second question is one of more importance and difficulty. Having suppressed the rebellion so far as it was maintained by an armed force, it became the duty of Congress to re-establish the broken relations of the State with the Union; and the same authority which recognized the existence of the war is, in my judgment, the only authority having the constitutional right to determine when, for all purposes, the war has ceased. The rights of war do not necessarily terminate with the cessation of actual hostilities. I can have no doubt that it is competent to the nation to retain the territory and the people which have once assumed a hostile and belligerent character "within the grasp of war," until the work of restoring the relations of peace can be accomplished; and that it is for Congress, the department of the National Government to which the power to declare war is intrusted by the Constitution, to determine when the war has so far ended that this work can be safely and successfully completed. The act of Congress of March 2, 1867, is, in my opinion, a legislative declaration that in Texas the war which sprung from the rebellion is not, to all intents and purposes, ended; and that it shall be held to continue until, in conformity with the legislative will, a State government, republican in form, and subordinate to the Constitution and laws of the United States, for which the act makes provision, shall have been re-established. It

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is true that, in several acts of Congress, the suppression of the rebellion and the end of the war have, in express terms or by implication, been recognized. But it will be found, on examination, that these phrases have been used in regard to special subjects, which do not seem to be inconsistent with the proposition that, for some purposes, the rights of war are not ended. While in respect to captured and abandoned property a limitation of the right to commence suits in the Court of Claims, dating from the end of the rebellion, has been fixed by statute, and, for the purpose of settling the question of the pay of officers in the volunteer army, the date of the President's proclamation declaring the insurrection at an end has been adopted to interpret the phrase "close of the war," it does not seem to me inconsistent with either of these enactments that Congress should declare that the States, whose civil governments have been destroyed, should continue under military authority until such governments could be restored.

Every act of Congress is to be presumed to be constitutional unless the contrary plainly appears. It is to be also presumed that Congress will provide for the restoration, through constitutional government, of the rebellious States, as speedily as in its judgment public safety will allow. But, until civil authority is restored, and the rights of person and property can be protected, in the region which has been the theater of war, by organized governments, the direction by Congress to employ a military force to give that protection and preserve the peace would seem to be the only alternative with anarchy.

It appears by the papers submitted that the trial of Weaver, before the military commission, was fairly and carefully conducted, and that the murder of which he was convicted was wanton and cruel. A freedman who had been at work for Weaver, and had chosen to leave his employment to go and work for another man, went to him in the field, near his house, in the morning, to ask for the wages which were due him. Weaver seized an ox-bow, and beat him severely with that. He then sent his hired man to his house for a double-barreled gun loaded with buckshot; and, on his return with it, shot the freedman through

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the head, killing him instantly. There appears to have been neither provocation nor resistance. This atrocious act was committed in the sight of the wife of the man murdered, who stood by her own door.

The finding of the commission has been approved by the military commander, and has been certified to be regular and proper by the Judge-Advocate General. I find no sufficient reason in law for the President's withholding his approval.

The papers which were sent to me are returned here-with.

I have the honor to be, &c.,

E. R. HOAR.

Hon. JOHN A. RAWLINS,

Secretary of War.

INTERNAL-REVENUE LAWS AND MUNICIPAL CORPORATIONS.

The city of Baltimore, by authority of the State legislature, made a loan to the Baltimore and Ohio Railroad Company, the latter agreeing to pay to the city interest thereon quarter-yearly, at the rate of 6 per cent. per annum, and giving to the city a mortgage upon all its property, to secure the performance of the agreement: *Held* that the company is not liable, under the provisions of the internal-revenue act of June 30, 1864, as amended by the acts of July 13, 1866, and March 2, 1867, to pay a tax upon the interest payable by it to the city on the said loan.

The opinions of Mr. Stanbery and Mr. Browning, touching kindred subjects which were submitted to and considered by them, (see 12 Opns., 176, 277, 376,) reviewed.

The provisions of the internal-revenue laws relating to income taxation do not apply to municipal corporations, either directly, by imposing a duty upon their receipts of revenue, or indirectly, by imposing a duty upon the sources whence their revenue is derived.

ATTORNEY-GENERAL'S OFFICE,
June 2, 1869.

SIR: I have considered the question submitted to the late Attorney-General, by the late Secretary of the Treasury, in his letter of the 6th of February last. The question is, whether, under the circumstances stated in the papers in-

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closed with the letter, the Baltimore and Ohio Railroad Company is taxable five per centum on the amount of interest payable by the company to the city of Baltimore on the debt hereinafter mentioned, and is authorized to withhold the amount of this tax from the interest to be paid to the city.

The company, if taxable at all, is taxable under section 122 of the act of June 30, 1864, (13 Stat., 284,) as amended by the act of July 13, 1866, (14 Stat., 138.)

I understand the facts to be that in the years 1853 and 1854, by authority of the legislature of the State of Maryland, the city of Baltimore loaned to the Baltimore and Ohio Railroad Company five millions of dollars. The railroad company agreed with the city of Baltimore to pay interest at the rate of six per cent. per annum on said five millions, quarter-yearly, and to pay the principal sum in the year 1890; and to secure the performance of this agreement executed to the city a mortgage upon all its property. No bonds, notes or other evidences of indebtedness were issued by the company, except this deed of mortgage. The city had no money in possession with which to make this loan; and to procure the money created a debt and issued its obligations bearing interest, which were sold, and the money obtained therefrom delivered by the city to the company. The interest payable by the company was made payable at dates fixed with reference to the dates at which the interest due from the city on its obligations was payable. I do not understand that the liability of the city to pay these obligations is dependent at all upon the ability of the company to perform its agreement, or that the holders of the obligations of the city have any legal or equitable interest in the mortgage executed by the company.

I have stated the case as I understand it from the papers submitted, and as the letter transmitting them is dated February 26, 1869, I shall consider the question of the liability of the company to pay a tax of five per cent. on the interest stipulated to be paid to the city by its agreement, under any of the laws relating to internal revenue in force immediately after the passage of an act of Congress entitled "An act to exempt wrapping-paper made from wood or corn-stalks from

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internal-revenue tax, and for other purposes," approved March 26, 1867, (15 Stat., 6.)

I find that at different times my predecessors have given in all four opinions upon questions in some respects kindred to the question submitted by you. The first is the opinion of Attorney-General Stanbery, dated June 28, 1867, addressed to the Secretary of the Treasury, upon the question whether certain certificates issued by the State of Alabama, and adapted and devised for the purpose of circulating as currency, were to be considered as notes of a "municipal corporation" within the meaning of the 2d section of the act of March 26, 1867, or as notes "of any person, State bank, or State banking association" within the meaning of the 6th section of the act of March 3, 1865, (13 Stat., 484,) as amended by section 9 (*bis*) of the act of July 13, 1866, (14 Stat., 146.) His opinion was that the State of Alabama was not a municipal corporation, person, State bank, or State banking association within the meaning of these sections; and that the last clause of section 44 of the act of July 13, 1867, (14 Stat., 163,) declaring that "any word or words in any and all parts of this act, and of all acts to which this act is additional, indicating or referring to person or persons, shall be taken to include partnerships, firms, associations, bodies corporate or politic, or any other party whatsoever, when not otherwise designated or manifestly incompatible with the intent thereof," did not so far extend the meaning of the word "person" in the said amendment to the said 6th section that it could be held to include a State of the United States. He was of opinion that the words "bodies corporate or politic" in this 44th section must be confined to private corporations as contradistinguished from public; and was confirmed in this conclusion by the express mention of "town, city, or municipal corporation" in the 2d section of the act of March 26, 1867, which he thought was virtually a legislative declaration that towns and cities were not included in the word "person" in the said amendment to said 6th section; otherwise the express mention of them in the act of 1867 would have been unnecessary. He also says, "It would, in my judgment, be going further than is allowable to apply the terms bodies corporate or politic even to

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such a subordinate corporate body as a city." This opinion might also be put upon the ground that in the act of 1865, as amended by the act of 1866, the express mention of State bank or State banking association is an implied exclusion of all other corporations; and the word "person" used in connection with the words "State bank or State banking association," must be confined to natural persons, and that the words "municipal corporation" in the 2d section of the act of March 26, 1867, must be limited to corporations similar to towns and cities which are subordinate to, and the creatures of, a State.

The next opinion is also by Attorney-General Stanbery, dated October 14, 1867, addressed to the Secretary of the Treasury, upon the question whether a railroad owned exclusively by a State of the United States, and managed by the agents of the State, is within the provisions of section 103 of the act June 30, 1864, (13 Stat., 275,) in reference to the payment of a duty of two and a half per cent. upon the gross receipts of the railroad, and within the provisions of section 122 of the same act, in reference to the payment of a tax of five per cent. upon the interest payable upon its bonds; and also upon the question whether articles manufactured by convicts in the penitentiaries or prisons of a State, for the State, are within the provisions of the last-named act imposing a tax upon the amounts, quantities, and values of goods, wares, merchandise, and articles produced or manufactured, (section 82 *et seq.* of the act of June 30, 1864, 13 Stat., 258 *et seq.*)

He takes notice that the tax imposed by said 103d section is imposed upon the firm, person, corporation, or company owning or possessing, or having the care or management of the railroad; and is of opinion that a State is not a corporation within the meaning of this section, or a body corporate or politic within the meaning of the 44th section of the act of July 13, 1866; that, if Congress had intended that a State should be subject to these provisions, the word "State" would naturally have been used as it is found in many places in the internal-revenue laws, and in section 182 of the act of June 30, 1864, it is enacted that "whenever the word State is used in this act, it shall be construed to

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include Territories and the District of Columbia, when such construction is necessary to carry out the provisions of this act." He refers also to the language of the 13th section of the act of August 5, 1861, (12 Stat., 297,) which expressly exempts from taxation property belonging to the United States or any State, or permanently or specially exempted from taxation by the laws of the State, as indicating the general policy of Congress, and says that "the income of a railroad owned exclusively by a State forms one branch of its revenue, and may be very essential for the support of the State, and it would be a very singular provision for Congress to lay a tax for the support of the Federal Government chargeable upon the revenue necessarily appropriated for the support of a State government." He is of opinion, for the same reason, that such a railroad is not liable to the tax imposed by section 122 of the act of June 30, 1864; and also that a State is not a person, firm, or corporation, within the meaning of those words, as used in section 82 *et seq.* of said act, which impose certain taxes upon manufactures, and that the employment of convicts is a part of prison discipline, and one controlling purpose of it is that of reformation by teaching habits of industry and useful occupation; and to hold that a State is within the provisions of the internal-revenue laws relating to taxation on manufactures, would require a State to take out a license under a penalty, and would subject its methods of punishing or reforming criminals to the laws of the United States, which he could not, without the clearest expression of such an intention, suppose Congress meant to do. (See *State of Georgia v. Atkyns*, 35 Geo. Rep., 315.)

The third opinion is by Mr. Browning, Attorney-General *ad interim*, dated March 30, 1868, to the Secretary of the Treasury, upon the question whether the city of Detroit is liable to pay taxes on articles manufactured by the labor of the inmates of its house of correction, a penal institution owned by the city. He decides that it is not; that a State may exercise its political power for such public objects as are acknowledged to be essential in such a manner as it sees fit; and that it is immaterial, so far as the question submitted is concerned, whether convicts are punished in a State prison or a city prison, as a

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State can administer its criminal laws in its own way; and that there is substantially no distinction, in respect to the tax on manufactures, between articles manufactured by convicts in a house of correction owned by a city, and those manufactured by convicts in a State prison.

The last opinion is by Mr. Browning, Attorney-General *ad interim*, dated May 8, 1868, to the Secretary of the Treasury, upon the question whether the Hartford National Bank is liable to pay a tax of five per cent. upon the dividends due the State of Connecticut upon its stock owned by the State. His opinion is that the bank is not liable; that the amendment of section 120 of the act of 1864, under which the case arose, as well as section 122 of the same act, belongs to the provisions of the internal-revenue laws which regulate taxation on income; that these sections really impose the tax upon the creditor, and not upon the debtor; and that the provisions requiring payment of the tax from corporations, and authorizing them to withhold the amount of the tax so paid from their stockholders or creditors, were intended only to establish the manner in which this tax upon income was to be collected. He rests his opinion that the State is not liable to pay this tax, upon the reasons given by Attorney-General Stanbery in the two opinions I have already referred to.

In the case submitted, I assume that the mortgage executed by the Baltimore and Ohio Railroad Company is an evidence of indebtedness within the meaning of section 122 of the act of 1864, as amended by the act of 1866; and I think with my predecessors that although the tax, in form, by this section, is imposed upon the railroad company, which is authorized to withhold it from the party or person to whom the interest is payable except when the contract is otherwise, yet, substantially, it is a tax upon such party or person, and that the United States collect the tax from the railroad company for their own convenience merely, and that the tax is not payable by the railroad company, unless the railroad company, not having contracted otherwise, can legally withhold the amount so paid.

In the internal-revenue laws in force on the 26th day of March, 1867, there were three general provisions defining

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the meaning of the word "person," which were the last clause of section 44 of the act of 1866, already referred to, a parenthetical clause of substantially the same import contained in the first paragraph of section 82 of the act of 1864, and the last clause of section 126 of the act of 1864. The language of the clause in section 44 is perhaps the most comprehensive.

The first general division of civil corporations is into public and private, and with public corporations such municipal corporations as towns and cities are classed. These municipal corporations are frequently called *quasi* corporations, although this designation is often confined to such cities and towns as have not been established by charter. Cities and towns are certainly, in a general sense, bodies politic and corporate, created for certain public purposes, and are a political part of the State, intrusted with powers and subject to duties very different from those of private corporations. It is true that, as incidental to the performance of their municipal duties, they may do many acts such as are usually done by private corporations, and they are sometimes specially empowered to do acts which have little or no connection with their ordinary municipal functions, and are entirely of a private nature. The loan in this case was not made by the city in the exercise of its municipal powers, but in the exercise of a power specially granted by the State, and such as is ordinarily granted to private corporations. It is noticeable that the internal-revenue laws nowhere impose taxes upon the performance of political or municipal duties, but only upon such employments, and the moneys received from, or things produced by, such employments as are ordinarily carried on by persons or private corporations. It has been held that when a city owns property, or performs acts not connected with its public municipal functions, it is then subject to many of the liabilities attaching to private corporations in respect to similar property or acts. (*Bailey vs. The Mayor, &c., of New York*, 3 Hill, p. 531; S. C., 2 Denio, 234.)

As the language of section 122 of the act of 1864, as amended, imposes the tax on the interest "whenever and wherever the same shall be payable, and to whatsoever

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party or person the same may be payable," and as a municipal corporation is, in a general sense, a body politic and a body corporate, the inquiry is, whether municipal corporations are, by the internal-revenue laws, subjected to the same taxation as private corporations in certain things that do not pertain to their strictly municipal duties, although in the performance of their municipal duties it may be manifestly incompatible with the intent of the statutes to hold that they are subject to make such taxation.

I do not know that there is any necessary connection between the right to tax the interest payable by the company to the city and the right to tax the interest payable by the city to the holders of its obligations. The city, as I think, is not directly taxable, under the internal-revenue laws, on the interest payable on its obligations; but the holders of the obligations must, it seems under section 117 of the act of 1864 as amended, include the interest received from the city in estimating the gains, profits, and income, on which the income tax is annually assessed. If the railroad company is liable to pay this tax, and is authorized to withhold it from the city, the tax is really a tax upon the city, as the city cannot withhold an equivalent amount from the holders of its obligations. As a city ordinarily has no income except what is required for the performance of its municipal duties, the difference between the amount received from the railroad company and the amount paid to the holders of the obligations must be raised by taxation by the city upon its inhabitants. Any tax imposed upon the city must, in effect, be paid out of the taxes it collects. If the city of Baltimore had made this loan to a person and not to a company, the interest received thereon by the city would not be taxable under the internal-revenue laws, unless the city is liable to pay an income tax under sections 116 and 117 of the act of 1864 as amended. But I think it is plain that, by these sections, Congress could not have intended to tax towns and cities on their income, gains, and profits, because, strictly speaking, they have no income, gains, and profits, and because the language is entirely inconsistent with any such intention, and the provisions of the law for enforcing the collection of the income tax are not such as Congress

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must have enacted if it had intended any such unusual thing as imposing a tax directly upon a town or city and enforcing its collection. Section 122, as amended, avoids all the difficulties that must arise in collecting a tax directly of a town or city, and it certainly, in express words, purports to tax interest due persons who would not be taxable therefor under sections 116 and 117, as amended, if said interest was received on debts due from persons; because section 122 includes interest due to non-residents, whether citizens or aliens, while section 116 does not purport to levy an income tax upon interest on debts due to resident aliens.

Did, then, Congress intend by said section 122, as amended, to indirectly tax a town or city when they are not made liable to pay similar taxes that are directly imposed by other sections of the same act? If it had so intended, I think it would have expressed this intention in unequivocal language.

It is to be considered that the word "corporation," and the words "bodies corporate or politic," ordinarily do not include such *quasi* corporations as cities and towns, unless the subject-matter of the enactment or the context seems to require such a meaning; that in the internal-revenue laws these words are associated with the words "partnerships, firms, and associations," which are persons exercising the employments usually exercised by private and not by municipal corporations; and that the 2d section of the act of March 26, 1867, uses the words "town, city, or municipal corporation," which by necessary construction implies that Congress at least thought it doubtful whether the word "person," in the internal-revenue laws then in force imposing taxes upon the amount of certain notes used for circulation, comprehended towns, cities, and municipal corporations; and the attention of Congress thus having been called to this probable construction of the statutes, it did not enact that the word "person," or the words "corporation, bodies politic or corporate," wherever they occur in the internal-revenue laws, shall include towns, cities, and municipal corporations, unless such a meaning is manifestly incompatible with the intent of the statute, but in the act of March 26, 1867, confined the enactment in this respect to the tax on certain notes used for circulation.

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To attempt to separate those functions of a municipal corporation which are of a private nature from those which are public and political, and to apply the internal-revenue laws to the former, and to compel such a corporation to obey these laws, would be attended with such practical difficulties, and might involve such an interference with the affairs of towns and cities by the United States, that an intention to do so on the part of Congress ought not to be presumed from doubtful expressions. In *Adams et al. vs. Bancroft*, (3 Sumner, 384-7,) Mr. Justice Story, in the opinion, says "duties are never imposed upon the citizens upon doubtful interpretation, for every duty imposes a burden upon the public at large, and is construed strictly, and must be made out in a clear and determinate manner from the language of the statute."

I do not think that the liability of the Baltimore and Ohio Railroad Company to pay this tax appears "in a clear and determinate manner from the language of the statute;" and, in my opinion, the company is not liable to pay the tax.

I have the honor to be, &c.,

E. R. HOAR.

Hon. GEO. S. BOUTWELL,

Secretary of the Treasury.

NOTE.—The subject considered in the foregoing opinion was subsequently before the Supreme Court of the United States in the case of *The United States vs. The Baltimore and Ohio Railroad Company*, (decided at the December term, 1872,) in which the plaintiffs sought to recover, under the provisions of section 122 of the act of 1864 and its supplement, a large amount as tax upon certain interest payable by the defendant to the city of Baltimore. The court held: 1st. That the tax imposed by that section was not a tax upon the railroad company, but a tax upon the income of the creditor, who in this case was the city of Baltimore; 2d. That the right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner, through their own agencies, carries with it an exemption of those agencies and instruments from the taxing power of the Federal Government; 3d. That the city of Baltimore is a municipal corporation, created for the purpose of exercising within a limited sphere the governmental powers of the State, and its revenues, when municipal in their nature, are, like those of the State, exempt from taxation; 4th. That the transaction here (the same precisely as that mentioned in the Attorney-General's opinion) was within the range of the municipal duties of the city, and the revenue derived therefrom municipal in its nature and not subject to the tax.

Resignation of Office.

RESIGNATION OF OFFICE.

Where a paper addressed to the President, containing the resignation of a judge to take effect on a future day, was placed in the hands of a third party to be transmitted to the President, but before the day arrived the resignation was revoked: *Held* that the paper, though subsequently delivered to the President by the individual in whose hands it had been placed, had no effect as a resignation.

ATTORNEY-GENERAL'S OFFICE,

June 2, 1869.

SIR: I have received the papers which you sent me concerning the case of the Hon. M. W. Delahay, judge of the district court of the United States for Kansas.

It appears by these papers that a paper addressed to the President of the United States, and containing a tender of the resignation of Judge Delahay as United States district judge of the district of Kansas, to take effect on the 1st day of June, 1869, was signed by him, and placed in the hands of Hon. John P. Usher to be transmitted to you, before the day when the resignation should take effect. It appears that afterward, on the 16th day of March, 1869, Judge Delahay addressed to Mr. Usher a letter, in which he stated that he had concluded to recall, and did thereby revoke, his resignation as United States district judge for Kansas, and asked that the paper containing it should be returned to him. Both of these papers are forwarded to you under the date of May 27, 1869, by Mr. Usher, and they are accompanied by a letter addressed to you, in which Judge Delahay informs you that he does not resign his office, and that he has demanded the resignation which he had prepared and given to Mr. Usher to be returned to him.

Upon these facts I am of opinion that the contemplated resignation of Judge Delahay has not taken effect, and that no vacancy exists in his office. Mr. Ushur was not deputed by you to receive the paper containing the resignation, and was only the agent of Judge Delahay for that purpose. Until the paper was delivered to you it had no operation, and the power to deliver it to you has been revoked. I think it has no more effect as a resignation than if it had

Rock Island Bridge.

been written and remained on the desk of Judge Delahay, and transmitted to you without his consent.

I return the papers sent by you to this office, and am,
Very respectfully, &c.,

E. R. HOAR.

The PRESIDENT.

ROCK ISLAND BRIDGE.

The War Department has no authority to proceed with the erection of any other bridge than the one "recommended by the Chief of Ordnance," referred to in the act of March 2, 1867; nor has Congress authorized an expenditure for the bridge of more than one million of dollars, irrespective of the amount to be refunded by the railroad company.

ATTORNEY-GENERAL'S OFFICE,

June 9, 1869.

SIR: Your letter of June 9, 1869, asking my opinion in regard to the construction of the acts of Congress providing for the erection of a bridge at Rock Island, Illinois, and inclosing the opinion of the Judge Advocate-General, dated June 4, 1869, is received at this office.

Without stating in detail the reasons upon which my opinion is founded, I will merely say that I concur substantially in the opinion given by the Judge Advocate-General. I do not think there is any authority in law for your Department to proceed with the erection of any other bridge than the one "recommended by the Chief of Ordnance," referred to in the act of March 2, 1867, (14 Stat., 485;) nor do I think that Congress ever authorized the expenditure by the United States for the bridge of more than one million of dollars, without reference to the amount to be refunded by the railroad company.

The opinion of the Judge Advocate-General, transmitted with your letter, is herewith returned.

I have the honor to be, &c.,

E. R. HOAR.

Hon. JOHN A. RAWLINS,
Secretary of War.

Appeals from the Commissioner of Patents.

CLAIM OF THE STOVER MACHINE COMPANY.**ATTORNEY-GENERAL'S OFFICE,***June 9, 1869.*

SIR: I have the honor to acknowledge the receipt of your letter of May 28th last, with papers inclosed, all relating to the claim of the Stover Machine Company against the United States, for money due on account of the "Tullahoma," and "Maumee." On the papers submitted, I do not find sufficient reason to justify you in paying over the money to Nathaniel Jarvis, jr., the person named as receiver in the order of Mr. Justice Ingraham.

The papers inclosed with your letter are returned herewith.

I have the honor to be, &c.,

E. R. HOAR.

Hon. A. E. BORIE,

Secretary of the Navy.

APPEALS FROM THE COMMISSIONER OF PATENTS.

Statutes relating to appeals from the Commissioner of Patents to the judges of the courts in the District of Columbia, reviewed.

The provision of the 11th section of the act of March 3, 1839, requiring an appellant from the Commissioner to the judge to pay into the Patent-Office, to the credit of the "patent fund," the sum of twenty-five dollars, is not repealed by the 10th section of the act of March 2, 1861.

Under the act of March 3, 1863, which abolished the circuit court of the District of Columbia, and established the supreme court of the District, the chief justice and associate justices of the latter court have the same right to hear and determine appeals from the Commissioner as the chief judge and assistant judges of the former court previously had.

The allowance of twenty-five dollars authorized by the act of August 30, 1852, to be paid out of the "patent fund" to the judge hearing the appeal, is now, by virtue of the 7th section of the act of July 20, 1868, payable out of the appropriation for "miscellaneous and contingent expenses of the Patent-Office," under the direction of the Secretary of the Interior.

ATTORNEY-GENERAL'S OFFICE,*June 9, 1869.*

SIR: In a letter from your Department of the 29th of

Appeals from the Commissioner of Patents.

April last, the two following questions are submitted to me: First, is a justice of the supreme court of the District of Columbia entitled to receive from the Commissioner of Patents the sum of twenty-five dollars for every appeal made, pursuant to existing laws, by an applicant for a patent, to said justice from the decision of the Commissioner? and, second, is the appellant, in such case, required by law to pay such sum of twenty-five dollars into the Patent-Office to the credit of the "patent fund?"

By the 7th section of the act of July 4, 1836, (5 Stat., 119,) the applicant for a patent, if the Commissioner of Patents decided that he was not entitled to a patent, was authorized to appeal to, and have the decision of, a board of examiners to be composed of three disinterested persons, who should be appointed for that purpose by the Secretary of State; provided that, before the board be instituted in any such case, the applicant should pay to the credit of the Treasury, as provided in the 9th section of the said act, the sum of twenty five dollars; and each of the said persons so appointed was entitled to receive, for his services in each case, a sum not exceeding ten dollars, to be determined and paid by the Commissioner out of any moneys in his hands.

By the 11th section of the act of March 3, 1839, (5 Stat., 354,) instead of the appeal allowed by said 7th section, the applicant had the right to appeal to the chief justice of the district court of the United States for the District of Columbia by giving notice thereof to the Commissioner; and also paying into the Patent-Office, to the credit of the "patent-fund," the sum of twenty-five dollars; and it was made the duty of the chief justice to hear and determine all such appeals. By the 13th section it was enacted that "there be paid annually out of the 'patent-fund' to the said chief justice, in consideration of the duties herein imposed, the sum of one hundred dollars;" and by the 12th section so much of the previous act as provided for a board of examiners was repealed.

In the act of August 30, 1852, (10 Stat., 75,) it is enacted substantially that the appeal may also be made to either of the assistant judges of the circuit court, upon whom are imposed and conferred all the powers, duties, and responsi-

Appeals from the Commissioner of Patents.

bilities imposed and conferred upon the chief judge by the previous act; that in case an appeal be made, the sum of twenty-five dollars required to be paid into the Patent-Office by the appellant shall be paid by the Commissioner to said chief judge or to either of said assistant judges; and that section 13 of the act of 1839 be repealed. In the 10th section of the act of March 2, 1861, (12 Stat., 248,) it is enacted "that all laws now in force fixing the rates of Patent-Office fees to be paid * * * are hereby repealed, and *in their stead* the following rates are established," &c.; and there follows a schedule of rates, in which no mention is made of appeals from the Commissioner to the judges.

The 3d section of the act of February 27, 1801, (2 Stat., 105,) established the circuit court of the District of Columbia, to consist of one chief judge and two assistant judges. Section 24 of the act of April 29, 1802, (2 Stat., 166,) enacts that the chief judge of the District of Columbia shall hold a district court on certain days named; and the 1st section of the act of May 27, 1852, (10 Stat., 8,) enacts substantially that in case of the sickness or other disability of the judge of the district court, the senior assistant judge of the circuit court shall hold the district court, and discharge all the judicial duties of the district judge during his sickness or other disability; and in case of the sickness or other disability of the senior assistant judge, the same duty shall devolve upon the junior assistant judge of said circuit court. While these two last-named acts of Congress were in force, the chief judge of the circuit court was *ex-officio* judge of the district court, and in case of his sickness or other disability, the senior assistant judge of the circuit court, or, if he were sick or otherwise disabled, the junior assistant judge of the circuit court held the district court, and discharged all the judicial duties of the assistant district judge.

The act of March 3, 1863, (12 Stat., 762,) abolishes (section 16) the circuit court and district courts, and establishes (section 1) the supreme court of the District of Columbia, consisting of four justices, one of whom is denominated chief justice. The 3d section enacts "that the supreme court, organized by this act, shall possess the same powers and exercise the same jurisdiction as is now pos-

Appeals from the Commissioner of Patents.

sessed and exercised by the circuit court of the District of Columbia, and the justices of the court so to be organized shall severally possess the powers and exercise the jurisdiction now possessed and exercised by the judges of the circuit court. Any one of said justices may hold a district court of the United States for the District of Columbia."

* * * And section 16 of the same act, after abolishing the circuit, district, and criminal courts of the District of Columbia, enacts that "all laws and parts of laws relating to said courts, so far as the same are applicable to the courts created by this act, are hereby continued in force in respect to such courts." * * * * There can be no doubt, I think, and none is suggested, that the chief justice and associate justices of the supreme court of the District of Columbia have now the same right to hear and determine appeals from the Commissioner of Patents, by an applicant for a patent, as the chief judge and the assistant judges of the circuit court had under the laws in force previous to the act of March 3, 1863.

I do not express any opinion whether these laws conferred the right upon those judges in their capacity of judges of the circuit court to be exercised by them judicially in said court, or to be exercised by them respectively only in the district court when holding that court pursuant to law; or whether the words "chief justice of the district court" in the act of 1839, and the words "assistant judges of the circuit court" in the act of 1852, merely designate the persons to whom appeals may be made, but do not make the right and duty to hear them a part of their judicial functions. In some capacity those judges had jurisdiction over these appeals, and I think the justices of the supreme court of the District now have the same.

Section 7 of the act of July 20, 1868, (15 Stat., 119,) in the proviso, enacts "that all the moneys standing to the credit of the 'patent-fund' in the hands of the Commissioner of Patents, and all moneys hereafter received at the Patent-Office for any purpose or from any source whatever shall be paid into the Treasury as received, without any deduction whatever; and the sum of two hundred and fifty thousand dollars is hereby appropriated for salaries and

Appeals from the Commissioner of Patents.

miscellaneous and contingent expenses of the Patent-Office, and for withdrawals, and for moneys paid by mistake, to be disbursed under the direction of the Secretary of the Interior," &c. It has been suggested that section 10 of the act of March 2, 1861, has repealed all previous provisions of law requiring the payment of twenty-five dollars to the Patent-Office by the appellant, and the payment of twenty-five dollars by the Commissioner of Patents to the judge hearing the appeal. But I think not. The payment to the judge is not made contingent or dependent upon the payment by the appellant. The judge is paid by the United States out of the public money for services which he is authorized and perhaps required to perform; the appellant is required to pay to the United States an equivalent sum as a condition precedent to the right of appeal.

By the act of 1836, the appellant was required to pay to the credit of the Treasury the sum of twenty-five dollars, and the three persons appointed a board of examiners were each to receive for their services a sum not exceeding ten dollars, to be determined and paid by the Commissioner out of any moneys in his hands. Under this statute it is plain that the amount of money paid to the board might be greater or less than the sum of twenty-five dollars. By the act of 1839, the chief justice of the district court was to be paid annually out of the "patent fund," in consideration of the duties imposed by that act, the sum of one hundred dollars. Under this statute the chief justice must have been entitled to receive each year one hundred dollars, and no more, whether he heard during that year any appeals or not, and whether the whole sum of money paid by appellants to the credit of the Treasury exceeded or fell short of the sum of one hundred dollars. By the act of 1852, the Commissioner of Patents is directed to pay to the chief judge or to either assistant judge hearing the appeal the sum of twenty-five dollars required to be paid by the appellant. But the payment to the judge is not made dependent upon the payment by the appellant, except, perhaps, it must appear to the judge that the twenty-five dollars had been paid into the Patent-Office by the appellant, otherwise the appeal would seem to have been improperly allowed, and

Appeals from the Commissioner of Patents.

should be dismissed. This sum of twenty-five dollars is to be paid by the appellant into the Patent-Office to the credit of the patent-fund. And the Commissioner is to pay to the judge hearing the appeal, out of the patent-fund, the sum of twenty-five dollars, which is the fund out of which the annual compensation of one hundred dollars granted by the law of 1839 was to be paid.

A change by statute, in the act of 1852, of the amount to be paid by the appellant, would not, of itself, affect the compensation of the judge who heard the appeal. The amount to be paid the judge or justice hearing the appeal seems to me in no sense a Patent-Office fee within the meaning of the 10th section of the act of 1861, but to be the compensation established by law to be paid by the United States out of the "patent-fund" for public services rendered, and now payable pursuant to the 7th section of the act of July 20, 1868, under the direction of the Secretary of the Interior, out of the appropriation for "miscellaneous and contingent expenses of the Patent-Office."

The 10th section of the act of 1861 repeals all laws then in force fixing the rates of the Patent-Office fees to be paid, and discriminating, &c., and establishes in their stead the "following" rates, and then follows a schedule of rates of fees for filing caveats, applications, and disclaimers, certifying copies, recording assignments, and taking an appeal from the examiners-in-chief to the Commissioner. But no mention is made of an appeal from the Commissioner to the judges. The section purports to establish certain rates of fees instead of other rates theretofore established; and it specifies for what, in each case, the fees established are to be paid. It does not purport to abolish absolutely any fees theretofore established, and the fees specified relate only to those matters and proceedings which are exclusively within the control of the Patent-Office. An appeal which takes the question of granting or refusing a patent entirely out of the control of the Patent-Office, and submits it for determination to an independent magistrate, seems to me not within the subject-matter to which this section relates. The right to take such an appeal was not taken away by this section, nor was the right of the judge hearing the appeal to receive the compensation granted by previous acts.

Legal-Tender Notes.

The general policy of Congress, in its enactments relating to patents, is and has been to make the Patent-Office self-sustaining, and Congress has expressly provided, in every enactment expressly relating to an appeal from the Commissioner to the judges, that the appellant, in such cases, should pay into the Patent-Office a certain sum of money, plainly for the purpose of supplying the means out of which the judge hearing the appeal was to be compensated. If Congress had intended to change the provisions of law then existing in regard to appeals from the Commissioner, I think it would have said so in plain words. In my opinion, the requirement of the 11th section of the act of 1839, that the appellant should pay into the Patent-Office, to the credit of the "patent-fund," the sum of twenty-five dollars, is not within the purview of the 10th section of the act of 1861, and is not repealed by it.

I have the honor to be, &c.,

E. R. HOAR.

Hon. J. D. COX,
Secretary of the Interior.

NOTE.—All of the provisions relating to appeals from the Commissioner of Patents to the judges of the courts in the District of Columbia, and fees for such appeals, referred to in the above opinion, are repealed by the act of July 8, 1870, (16 Stat., 198,) which provides for an appeal, except in interference cases, from the Commissioner to the *supreme court* of the District *sitting in banc*, but does not require the payment of a fee by the party appealing. The existing law will be found in sections 48 to 52, inclusive, of that act.

LEGAL-TENDER NOTES.

The annual installments of interest due to the United States under the convention with Spain of February 17, 1834, may, by virtue of the legal-tender act of February 25, 1862, be paid in Treasury notes, if the Spanish government chooses to offer them in payment, there being no express provision in the convention that the money shall be paid in coin.

ATTORNEY-GENERAL'S OFFICE,
June 10, 1869.

SIR: Your letter of the 9th instant, informing me that

Legal-Tender Notes.

"The annual installments' of interest due to the United States under the convention with Spain, concluded on the 17th of February, 1834, have, since the passage of the legal-tender act, been paid in currency, and such mode of payment has been acquiesced in by this Government. Many of the holders of certificates, however, claim that they are entitled to payment in coin, and the attention of the Department has lately been called by them to recent decisions of the United States Supreme Court on the legal-tender act, as bearing on the question relating to the manner in which payments of the installments referred to have heretofore been received," and asking my opinion upon the subject, was received this day.

By the convention with Spain, to which you refer, it was provided that Spain should pay to the United States "the sum of twelve millions of reals *vellon* in one or several inscriptions" of perpetual rents, bearing an interest of five per cent. per annum; said inscription or inscriptions to be issued "in conformity with the model or form annexed" to the convention. In the annexed form of the inscription it is recited that "the bearer of this is entitled to an annual rent of —— dollars or —— francs, payable at Paris every six months, on the — and — of — by the bankers of Spain in that city, rating each dollar at 5 francs 40 centimes, in conformity with the royal decree of December 15, 1825." (8 Stat., 462.)

By the act of Congress approved February 25, 1862, it is provided that the notes thereby authorized to be issued from the Treasury of the United States shall be receivable in payment of all debts and demands of every kind due to the United States, except duties on imports. (12 Stat., 345.) The money to be paid, under the convention with Spain, is a debt due to the United States payable in dollars. There is no express provision that it shall be payable in coin.

I am not aware of any decision of the Supreme Court of the United States in which it has been held that a debt due to the United States, not excepted in the legal-tender act, is not payable in Treasury notes. The court have, indeed, decided that a contract between private persons for the payment of a sum in gold or silver coin may be specifically enforced, and that the creditor is not obliged to receive Treas-

Central Pacific Railroad Company.

ury notes in satisfaction of the debt. But where there has been no express stipulation for payment in specie, it has not been held that, even between private persons, a payment in Treasury notes is not valid and sufficient, although the reasoning of the court in the case referred to might perhaps lead to the conclusion that when a contract for the payment of money was made at the time when no other money was recognized by law than gold and silver, the same rule should be applied as if there had been an express stipulation for the payment of the debt in specie. But the law of the United States expressly permitting the payment of all debts due to the United States, except duties on imports, in currency, I can see no reason to doubt that the United States are bound to receive from Spain the sums which may become due under the convention, from time to time, in Treasury notes, if the Spanish government chooses to offer them in payment.

I have the honor to be, &c.,

E. R. HOAR.

Hon. HAMILTON FISH,
Secretary of State.

CENTRAL PACIFIC RAILROAD COMPANY.

The Central Pacific Railroad Company having accepted the conditions of the act of July 1, 1862, in compliance with the 9th section of that act, a refusal on the part of its directors or any of its officers charged with the management of the concerns of the company to provide suitable cars for the transportation over its road of troops and military supplies whenever requested to transport the same by any Department of the Government, or a refusal on their part to allow the Government a preference in the use of its road for such purpose, would work a forfeiture of its franchise, which might be declared and enforced by judicial proceedings instituted in behalf of the United States.

The company ought not to be paid for the transportation of troops in box freight cars, at passenger rates, but at such lower rates as are a suitable compensation for the inadequate accommodations furnished.

ATTORNEY-GENERAL'S OFFICE,

June 11, 1869.

SIR: I have the honor to acknowledge the receipt of your letter of the 27th of May last, with accompanying copies of

Central Pacific Railroad Company.

the correspondence between the quartermaster of the army of the United States at San Francisco, California, and the superintendent of the Central Pacific Railroad Company. It appears, from this correspondence, that the superintendent was requested to furnish on two successive days, at the eastern terminus of the road, a train of seven passenger and four freight cars, for the transportation to Sacramento, California, of one regiment of troops and a quantity of military stores. The superintendent replied that every passenger-car was fully employed between Elko and Sacramento, and he could only furnish freight-cars at the end of the track, except, perhaps, he might be able to furnish one passenger-car for the use of the officers, and that when the tracks connect he would have plenty of cars. Box freight-cars were actually furnished. You ask my opinion "as to the proper measures to be taken by the Department of War to enforce a compliance by the company with the terms of its engagements in the future."

The 6th section of the act of July 1, 1862, (12 Stat., 489,) provides "that the grants aforesaid are made upon condition that said company" (the Union Pacific Railroad Company) "shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the Government, whenever required to do so by any Department thereof, and that the Government shall at all times have the preference in the use of same for all the purposes aforesaid, (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service,)" &c., &c. By the 9th section of the same act, "the Central Pacific Railroad Company of California, a corporation existing under the laws of the State of California, are hereby authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento River, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first-mentioned railroad and telegraph line on the eastern

Citizenship.—Passports.

boundary of California. Each of said companies shall file their acceptance of the conditions of this act in the Department of the Interior within six months after the passage of this act." It is understood that the Central Pacific Railroad Company has filed its acceptance of the conditions of this act in the manner required.

If the Central Pacific Railroad Company, by its directors or by any officers appointed to manage the general concerns of the corporation, when requested to transport over its road troops and military supplies, by any Department of the Government, willfully refuses to provide suitable cars for that purpose, or to give the United States a preference in the use of the road for the transportation of troops and military supplies, this will, in my opinion, work a forfeiture of its franchise, which can be declared and enforced by judicial proceedings, if the United States choose to institute proceedings for that purpose.

I am also of opinion that in regard to the past violations of its engagements with the United States, to which you refer in your letter, the company is not entitled to be paid for the transportation of the troops in box freight-cars, at passenger rates, but at such lower rates as are suitable compensation for the inadequate accommodations furnished.

I have the honor to be, &c.,

E. R. HOAR.

Hon. JOHN A. RAWLINS,
Secretary of War.

CITIZENSHIP.—PASSPORTS.

Children born abroad whose fathers were, at the time of their birth, citizens of the United States, and had at some time resided therein, are American citizens under the provisions of the act of February 10, 1855, and entitled to all the privileges of citizenship which it is in the power of the United States Government to confer.

But if, by the laws of the country of their birth, such children are subjects of its government, it is not competent to the United States, by legislation, to interfere with that relation while they continue within the territory of that country, or to change the relation to other foreign nations which, by reason of their place of birth, may at any time exist.

Citizenship.—Passports.

Where application was made to the Department of State for passports for five persons residing in the island of Curaçoa, four of whom were born in that island, and one in the island of St. Thomas, and all of whom were children of native citizens of the United States, but it did not appear that any of the applicants had ever resided or intended to reside in the United States: Advised that the applicants are not entitled to passports.

Seemle that the granting of passports is not obligatory in any case, but is only permitted where not prohibited by law.

ATTORNEY-GENERAL'S OFFICE,

June 12, 1869.

SIR : I have the honor to acknowledge the receipt of your letter of May 11, 1869, in which you ask my opinion whether five persons residing in the island of Curaçoa, for whom application is made for passports, are citizens of the United States, and entitled, as such, to have passports issued to them. You state that four of them are over twenty-one years of age, and that one is a youth of fifteen ; that four of them were born in that island, and one was born in St. Thomas ; that four of them are children of native citizens of the United States domiciled at Curaçoa, who would appear not to have resided in this country since 1841, and the other the son of a native citizen, whose residence is not stated ; and that it does not appear affirmatively that any of the applicants have resided or intended to reside in the United States, or that more than one of them has ever been in this country.

I do not think that either of these facts is material to the question of their citizenship, except the fact that their fathers were, at the time of their birth, citizens of the United States. That fact being established, the children, under and by virtue of the act of Congress of February 10, 1855, chap. 71, (10 Stat., 604,) are deemed and considered, and are thereby declared, to be citizens of the United States, " provided, however, that the rights of citizenship shall not descend to persons whose fathers never resided in the United States." If, therefore, the fathers of the applicants, at the time of their birth, were citizens of the United States, and had at some time resided within the United States, it is my opinion that the applicants are citizens of the United States, under the provisions of the statute, and entitled to all the privileges of

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citizenship which it is in the power of the United States Government to confer. Within the sovereignty and jurisdiction of this nation, they are undoubtedly entitled to all the privileges of citizens.

In regard to the other branch of your inquiry, whether they are entitled, as such, to passports, my answer must be more qualified. I understand a passport to be a certificate of citizenship, and that a person receiving it is certified to be entitled to such protection as the Government can give to its citizens in foreign countries. But while the United States may, by law, fix or declare the conditions constituting citizens of the country within its own territorial jurisdiction, and may confer the rights of American citizens everywhere upon persons who are not rightfully subject to the authority of any foreign country or government, it is clear that the United States cannot, by undertaking to confer the rights of citizenship upon the subjects of a foreign nation, who have not come within our territory, interfere with the just rights of such nation to the government and control of its own subjects. If, therefore, by the laws of the country of their birth, children of American citizens, born in that country, are subjects of its government, I do not think that it is competent to the United States, by any legislation, to interfere with that relation, or by undertaking to extend to them the rights of citizens of this country, to interfere with the allegiance which they may owe to the country of their birth while they continue within its territory, or to change the relation to other foreign nations which, by reason of their place of birth, may at any time exist. The rule of the common law I understand to be, that a person "born in a strange country under the obedience of a strange prince or country, is an alien," (Co. Litt., 128 b.,) and that every person owes allegiance to the country of his birth. I have no means of ascertaining what the law of Curaçoa may be in this respect. But if the applicants can receive any passport from your Department, it would seem that it must be a qualified one, which should state that although they were citizens of the United States, they were only so in the qualified sense which I have indicated, reserving such rights, obligations, and duties as might attach to them under the laws of the country in which they

Claim of Henry S. Bulkley.

live and in which they were born, over which the United States could have no control while their domicile continued, nor until they should come within our territorial jurisdiction.

I do not understand that the granting of passports from your Department is obligatory in any case, but is only permitted where it is not prohibited by law. Whether, according to the practice of your Department, passports are ever issued with any exceptions or limitations attached to them, I do not know; but in the strict and general sense of the language of your question, I am of opinion that the applicants are not entitled to passports.

I have the honor to be, &c.,

E. R. HOAR.

Hon. HAMILTON FISH,
Secretary of State.

CLAIM OF HENRY S. BULKLEY.

By the terms of a contract with B., for the transportation of military supplies from Fort Leavenworth to Salt Lake City, it was agreed that in case any of the trains of the contractor were stopped at any time or place *en route* over two days, by any act of the Government, he should be allowed demurrage at a certain rate; and that all orders from officers of the Government to halt trains should be in writing, &c. Held that for the stoppage of a train made by order of an officer of the Government, issued at the request or solicitation of, or in pursuance of an agreement with, a servant of the contractor in charge of the train, the United States would incur no liability under the contract; but that mere acquiescence, without protest, on the part of the servant, in an order given by such officer to stop the train, would not prejudice the rights of the contractor.

ATTORNEY-GENERAL'S OFFICE,

June 14, 1869.

SIR: I have received your letter of the 21st ultimo, with a letter from the Second Comptroller to you, and other papers inclosed, all relating to a claim against the United States of Henry S. Bulkley for the use and benefit of I. N. Irwin. You ask my opinion upon the legal question stated in the letter from the Second Comptroller. The statement of the case in the letter of the Comptroller is substantially as follows:

Claim of Henry S. Bulkley.

Henry S. Bulkley contracted under seal with the United States to receive at any time in any of the months from April to September, both inclusive, of the year 1865, from the officers of the Quartermaster's Department, at certain places designated in the contract, and to transport to certain other places, also designated in the contract, all such military stores and supplies as should be offered to him for transportation. The 9th article of the contract provides, "that in case any one or more of the trains of the said Henry S. Bulkley are stopped or delayed at any time or place exceeding two days, either under the orders of an officer of the Quartermaster's Department, or the commanding officer of a post, or of troops present, or by any other act on the part of the Government or its agents, the contractor shall be paid, upon a statement in writing procured from the officer or agent of the Government causing the delay, the sum of \$5 *per diem* for each and every team in the train for each and every day they may be so delayed; and in case the officer or agent of the Government aforesaid shall refuse to furnish such statement in writing, then the delay shall be paid for as above on the affidavits or other satisfactory evidence of credible and competent witnesses. All orders from officers or agents of the Goverment to halt trains shall be given to the contractor or his agents in writing, expressing fully the reasons therefor."

I. N. Irwin was a sub-contractor under Bulkley. Two trains owned by Irwin were loaded at Fort Leavenworth, Kansas, in July, 1865, with stores to be transported to Salt Lake City. They arrived at Fort Halleck on the 18th day of October, 1865, and were there stopped by a written order of Captain S. B. Blair, assistant quartermaster of the United States volunteers, who ordered the property to be there stored until the following "spring or such time as it may be safely forwarded." The claim of Bulkley is, to be paid five dollars *per diem* for each and every team so stopped.

It is in evidence that Irwin was not at Fort Halleck when the trains were stopped, but that the trains were in charge of Troy Stockstill, his wagon-master. There is much conflicting testimony as to whether or not Stockstill desired that the trains might be stopped at Fort Halleck. There is no

Claim of Henry S. Bulkley.

evidence tending to prove that Stockstill protested against the stoppage of the trains, or that he in any way objected to it. The Comptroller then asks this question: "Would the solicitation of Stockstill, that the trains of which he had charge should be stopped at Fort Halleck, or his acquiescence, without protest, in their stoppage by the proper officer at Fort Halleck, release the United States from responsibility for demurring under the contract?"

If Stockstill, the wagon-master in charge of the trains, solicited or requested of the proper officer of the Government at Fort Halleck that the trains might be stopped there, and thereupon this officer ordered them stopped, this would be, in legal effect, a permission on the part of the officer that the trains might stop at Fort Halleck, as requested, and the delay thus occasioned would not be a delay caused by the officer, but by the wagon-master; and for such a delay the United States would not be liable under the contract. If, after making such a request, and the issuing of the order to stop the trains, thereupon the wagon-master or the person having charge of the trains desired to proceed on the way, it would be the duty of the wagon-master or of such person to revoke the original request and ask permission to proceed.

If, after this request to proceed, the trains were still stopped at Fort Halleck more than two days by order of any officer of the Government designated in the contract, the United States would be liable to pay the sum stipulated in the 9th article of the contract for the delay thus caused after the request to stop the trains had been revoked. If the trains were originally stopped at Fort Halleck by an order of any officer of the Government designated in the contract, against the will or without regard to the will of the wagon-master, or of the person having charge of the trains, and no request or solicitation to have them stopped was made by the wagon-master or such person, then the United States would be liable to pay for the delay thus caused as stipulated in the 9th article, even although Stockstill did not protest against or object to the order. Any officer named in the 9th article had the right, by his order, to stop the trains; and the contractor with the United States was bound to acquiesce in it, and it was not necessary that he protest against the order to save his rights under the article of the contract.

Claim of Henry S. Bulkley.

The fact that there is no evidence that Stockstill protested against, or objected to, the order stopping the trains, may be competent to be considered in connection with all the other evidence in the case, in order to determine whether he did or did not in fact request the trains to be stopped. The form of words used is not important, if, regarded in connection with all the circumstances under which they were uttered, they amounted in substance to a request or solicitation upon the proper officer of the Government that the trains might be stopped, and if, in pursuance of that request or solicitation, the officer issued the order. Any agreement between such an officer and the wagon-master or person in charge of the trains that they should be stopped at Fort Halleck for the common benefit of the United States and the contractor would have the same effect as a request or solicitation. Mere acquiescence, without protest or objection, in an order already made, is not in itself a request or solicitation, which, if made at all, must have been made before the order was issued. As the order to store the property at Fort Halleck is in writing and signed by the assistant quartermaster, and states that "in consequence of the bad condition of the transportation and the lateness of the season, I judged it unsafe and detrimental to the interests of the Government for the trains to proceed farther this season, and ordered the property stored here till spring, or till such time as it may be safely forwarded," in a suit at law this would make out a *prima facie* case for the claimant, and the burden of proof would be upon the United States to show, if they could, that this order was issued at the request or solicitation of, or by agreement with, the claimant or his agent. I express no opinion upon the question of fact whether any such request or solicitation or agreement was made.

I have the honor to be, &c.,

E. R. HOAR.

Hon. GEORGE S. BOUTWELL,
Secretary of the Treasury.

Judge Advocates of the Army.

JUDGE ADVOCATES OF THE ARMY.

The present incumbents of the office of judge advocate are officers of the Regular Army of the United States, lawfully appointed and commissioned.

Provisions of the act of July 17, 1862, and subsequent statutes relating to these officers, considered.

ATTORNEY-GENERAL'S OFFICE,
June 14, 1869.

SIR: By your letter of May 11, 1869, you submit for my "opinion upon the legal points involved in the case, the accompanying reports of the Adjutant-General and the Judge Advocate-General, dated April 26, and May 7th, respectively, concerning the status of the corps of judge advocates of the Army." The difference between these two officers, which their opinions indicate, is upon the question whether the judge advocates now acting and paid as such are lawfully holding their offices, or whether they should be selected by the Secretary of War, and be anew nominated and appointed by the President by and with the advice and consent of the Senate.

By the statute of 1862, ch. 201, section 6, (12 Stat., 598,) it is was enacted "That there may be appointed by the President, by and with the advice and consent of the Senate, for each army in the field, a judge advocate, with the rank, pay, and emoluments, each, of a major of cavalry, who shall perform the duties of judge advocate for the army to which they respectively belong, under the direction of the judge advocate-general." The number was thereby limited only by the number of armies in the field; and the Adjutant-General argues from the provisions of this section that they were not made officers of the permanent Army of the United States. It would seem that, as they were appointed "for each army in the field," and to perform the duties of judge advocate for the army to which they respectively belong, their offices would terminate with the disbanding of such armies respectively. This consideration would not, however, be decisive, because the duties which they were to perform did not relate exclu-

Judge-Advocates of the Army.

sively to the volunteer force, but applied alike whether the Army consisted of regulars, or volunteers, or both.

By the statute of 1866, ch. 299, section 12, (14 Stat., 334,) it was provided that "of the judge-advocates now in office there may be retained a number not exceeding ten, to be selected by the Secretary of War, who shall perform their duties under the direction of the Judge-Advocate-General, until otherwise provided by law, or until the Secretary of War shall decide that their services can be dispensed with." The Secretary of War did not, by any formal order, select the judge-advocates to be retained in the service; but it appears by the statement of the Judge-Advocate-General that several of the judge-advocates then in service were thereupon discharged, and one deceased, leaving in office ten, the precise number authorized to be retained; and that these have been recognized by the War Department as holding the office, have been ordered to duty, paid, their names included in the Army Register, and such of them as continued in the service up to that time, nine in number, were, on the 15th of January, 1868, reported by the Secretary of War to the Senate, in answer to a resolution of that body, as the judge-advocates appointed in the Regular Army.

The statute of 1867, ch. 79, (14 Stat., 410,) amended the last clause of section 12 of the statute of 1866, above recited, by "repealing all after and including the words 'until otherwise provided by law,' so as to place the judge-advocates thereby authorized to be retained in service upon the same footing in respect to tenure of office, and otherwise, as other officers of the Army of the United States." When this act was passed, there were actually retained in the service the number of judge-advocates which the Secretary of War was authorized to select and retain, the selection having been made by the retirement from the service of all except those who were so retained.

By the act of Congress approved April 10, 1869, (16 Stat., 44,) the number of judge-advocates of the Army was fixed at eight, and the President was thereby authorized, by and with the advice and consent of the Senate, to fill all vacancies which have occurred or may hereafter occur therein. At the time of the passage of this statute there were eight

Judge-Advocates of the Army.

judge-advocates recognized by the War Department, employed in the Bureau of Military Justice, under the direction of the Judge-Advocate-General, being the number remaining of the judge-advocates originally appointed under the statute of 1862.

I concur in opinion with the Judge-Advocate-General, that they are officers of the Regular Army, lawfully appointed and commissioned, and not needing any new appointment by the President, by and with the advice and consent of the Senate. The Adjutant-General questions the legality of their tenure of office, because it interferes with the constitutional prerogatives of the President to appoint officers by and with the advice and consent of the Senate. His objection seems to be based upon the idea that there is something essentially different in its own nature between an office in the permanent Army and an office in an armed force raised for a limited time or a temporary purpose.

By the Constitution, Congress has power to raise and support armies, and to make rules for the government and regulation of the land and naval forces. The President has power to nominate, and, by and with the advice and consent of the Senate, to appoint all officers of the United States, whose appointments are not therein otherwise provided for, and which shall be established by law. The officers who are now holding and exercising the office of judge-advocate have all been appointed by the President, with the advice and consent of the Senate. If it were true that they had been thus appointed as officers of a temporary force, I can see no constitutional objection to the power of Congress, under its authority to raise and support armies, and to make rules for the government and regulation of them, to extend or limit the term of service of any part of the force with the consent of those who belong to it, to provide by law for a change in the duties of the incumbents of offices already existing, and to transfer officers belonging to one part of the military force to service in another. Whatever may have been originally contemplated in regard to these judge-advocates, they were officers appointed and commissioned in the manner contemplated by the Constitution in the military service of the United States. There was no specific limitation of their con-

Retired Officers of the Army.

tinuance in that service. In both of the acts last cited, I think Congress has expressly recognized them as in the permanent service of the United States, and provided for their continuance in it. So far as it depended upon their selection by the Secretary of War, I think that selection had been practically and sufficiently made and recognized by the executive and legislative departments of the Government, and that, by the statutes of 1867 and 1869, the present incumbents of the office of judge-advocate are officers of the Army of the United States.

I have the honor to be, &c.,

E. R. HOAR.

Hon. JOHN A. RAWLINS,
Secretary of War.

RETIRED OFFICERS OF THE ARMY.

Army officers who have been retired from active service by the President under the 12th section of the act of July 17, 1862, cannot be re-instated on the active list, except by a new appointment with the advice and consent of the Senate, and where vacancies on the active list exist which may lawfully be filled.

Such officers can, however, under that section, be assigned by the President to any appropriate duty in any department of the service, and while so assigned and employed they will be entitled to the full pay and emoluments of their respective grades.

ATTORNEY-GENERAL'S OFFICE,
June 14, 1869.

SIR: Your communication of the 7th of April last, with an official copy of General Order No. 7 inclosed, submits to me for an opinion the question whether the President can restore to active service in their several corps any of the officers retired from active service by this order.

The order was issued by direction of the President February 23, 1869, and pursuant to the 12th section of the act of July 17, 1862, (12 Stat., 596.) I assume that the names of these officers had been borne on the Army Register forty-five years, or that they were each of the age of sixty-two years when the order was issued; and that the discretion of the

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President to retire them from active service, and direct their names to be entered on the retired list of officers, has been exercised in the manner authorized by law. Sections 15, 16, 17, 18, and 25 of the act of August 3, 1861, (12 Stat., 289-291,) and section 32 of the act of July 28, 1866, (14 Stat., 337,) all relate to the retirement of officers of the Army. The status of an officer placed upon the retired list is not very distinctly set forth in the statutes; but in the 16th section of the act of August 3, 1861, it is provided, among other things, that an officer adjudged incapable of performing the duties of his office "shall be placed upon the retired list and withdrawn from active service and command, and from the line of promotion," "and the next officer in rank shall be promoted to the place of the retired officer according to the established rules of the service. And the same rule of promotion shall be applied successively to the vacancies consequent upon the retirement of an officer."

I am of opinion that these words cited from the 16th section of the act of 1861 are applicable to officers retired from active service by the President under the authority of the 12th section of the act of 1862. The retirement of an officer removes him from the active-service list; it creates a vacancy to be filled by the promotion of the officer next in rank, according to the established rule of the service. To re-instate such an officer on the active list is, in my opinion, a new appointment, which can only be made by the President, by and with the advice and consent of the Senate, in cases where vacancies on the active list exist and can be lawfully filled. By the 12th section of the act of 1862 the President can assign any officer retired under that section, under the act of 1861, to any appropriate duty, "and such officer thus assigned shall receive the full pay and emoluments of his grade while so assigned and employed." The 6th section of the act of March 3, 1869, (15 Stat., 318,) provides that, until otherwise directed by law, there shall be no new appointments and no promotions in the departments therein named. As retired officers cannot be put upon the active list except by a new appointment, this section prohibits any restoration to active service in these departments. Retired officers can, however, under the 12th section of the act of 1862, be assigned by the

Massachusetts Troops Enlisted in California.

President to any appropriate duty in any of these departments, as well as in any other department of the service. See opinion of Attorney-General Cushing, 8 Opns., p. 223.

I have the honor to be, &c.,

E. R. HQAR.

Hon. JOHN A. RAWLINS,
Secretary of War.

—
MASSACHUSETTS TROOPS ENLISTED IN CALIFORNIA.

By an arrangement made between the Secretary of War and the governor of Massachusetts, it was agreed that the expense of transporting certain companies of cavalry, raised and mustered into the United States service in California, from the latter State to Massachusetts, where they were to form part of a Massachusetts regiment and be sent to the field as such, should be paid by Massachusetts; subsequently the men were mustered out of service in Virginia: Held that there was no legal obligation on the part of Massachusetts to defray the expense of returning the men to the place of muster.

This expense primarily devolved upon the United States, in whose service the troops were employed, and was not assumed by Massachusetts by the agreement referred to.

ATTORNEY-GENERAL'S OFFICE,
June 15, 1869.

SIR: I have the honor to acknowledge the receipt of your letter of the 25th of May, 1869, transmitting a letter from the Second Comptroller in relation to a charge against the State of Massachusetts of the sum of \$55,433.43, for commutation of travel-pay of troops who volunteered in California, and were credited to the quota of Massachusetts, with accompanying papers, and asking my opinion whether the State of Massachusetts was, or was not, liable to pay the commutation of travel-pay charged against her.

It appears by the papers submitted, that citizens of California, desiring to take part in the war for the suppression of the rebellion, applied to the governor of Massachusetts, from which State many of them had gone, for permission to raise some companies of cavalry in California, to be transported to

Massachusetts Troops Enlisted in California.

Massachusetts, and there form a part of a Massachusetts regiment of cavalry, and to constitute a part of the contingent of that State. At the time this offer was made Massachusetts had furnished her full quota under all calls by the President, and continued to furnish it, without including any men from California, up to the close of the war. The proposition to allow these troops to Massachusetts was declined by the War Department; but an arrangement was finally made by which it was agreed between the Secretary of War and the governor of Massachusetts that the expense of transporting the companies raised in California to Massachusetts should be paid by Massachusetts; that the men should be mustered into the service of the United States in California, and should be equipped and sent to the field as a part of a Massachusetts regiment after their arrival in that State. This was done; and at the close of the war the men were mustered out at Fairfax Court-House, in Virginia, and claimed and were held entitled to receive from the United States transportation, or a commutation in money equivalent thereto, to the place where they were originally mustered into the service in California. Some correspondence on the subject took place between the War Department and Governor Andrew, of Massachusetts, who said that he, for one, should prefer that the amount should be charged to Massachusetts in her account with the National Government rather than that the men should not receive it; but there does not appear to have been any agreement on the part of Massachusetts that it was properly chargeable to the State.

Upon this state of facts, which I believe includes all that are material, I am unable to see any ground upon which this charge against the State of Massachusetts can be sustained. The charge is for the transportation of troops to their homes or place from which they had been mustered in. It is a charge, therefore, primarily upon the National Government, in whose service the troops were employed. Massachusetts, by special contract, agreed to pay for the transportation of these men from California to Boston as a condition of being allowed to enlist them as part of a Massachusetts regiment; but there was no contract respecting their return to California. This may not have been, and probably was not,

Claim of Major Herod.

thought of by either party. Whether, if it had been thought of, any arrangement respecting it would have been made, is, of course, wholly uncertain. But the whole stipulation made by the United States as the condition of mustering the men into its service in California as part of a Massachusetts regiment was complied with. The mustering in, in California, implied an obligation on the part of the United States to return the men to the place of muster if they should survive the perils and losses of the war. I can, therefore, see no legal obligation on the part of Massachusetts to pay this expense, and no legal right on the part of the United States to make it a subject of charge.

The equities of the case would seem to lead to the same result. The service was rendered by the men of California to the cause of the country. Their employment did not diminish the number of men which Massachusetts was called or required to furnish, because the whole number was supplied without including these. The possibility that, under some circumstances, they might have been credited to Massachusetts, may have been the reason why the State was willing to pay the expense of transportation from San Francisco to Boston. But upon a contract which might prove to be, and has actually resulted in being, profitable to only one party, there would seem to be no equity in making the other liable beyond the extent of their express agreement.

The papers submitted are herewith returned.

I have the honor to be, &c.,

E. R. HOAR.

Hon. GEORGE S. BOUTWELL,
Secretary of the Treasury.

CLAIM OF MAJOR HEROD.

An officer in the military service, who, having been arrested for an offense, tried by a court-martial, and convicted, is sentenced to a punishment which necessarily severs his connection with the service, does not forfeit his pay for the period intervening between the date of the arrest and the date when the sentence takes effect, unless forfeiture of pay for such period is expressly made a part of the sentence.

Claim of Major Herod.

The monthly pay of officers of the Army is prescribed by statute, and so long as a person is an officer of the Army he is entitled to receive the pay belonging to the office, unless he has forfeited it under some provision of law, whether he has actually performed military service or not.

ATTORNEY-GENERAL'S OFFICE,

June 16, 1869.

SIR: I have the honor to acknowledge the receipt of your letter of the 19th of April last, with copies inclosed of the report of the Judge-Advocate-General and the opinion of the Second Comptroller, on the case of Major T. G. S. Herod, of the Sixth Illinois Cavalry, in the volunteer service of the United States. Major Herod was charged with murder, arrested, tried by a court-martial, and sentenced to be hung. The proceedings of the court-martial were approved by the proper military commander, and forwarded to the President for his action thereon. The President commuted the sentence to confinement at hard labor in the penitentiary for ten years, and Herod was committed to the penitentiary. Subsequently the unexecuted portion of this sentence was remitted, and Herod was released from confinement.

You ask my opinion upon "the right of an officer to pay from the date when placed in arrest for an offense to the date when the sentence of a court-martial, which separates him from further military service, goes into operation."

It was not expressly a part of the sentence that Herod should forfeit his pay from the date of his arrest, and I know of no statute imposing a forfeiture of pay from the date of arrest in a case like this of Herod's. The sentence that he be hung necessarily implied a dismissal from the service, but not, as it seems to me, the forfeiture of back pay. I can find no authority for the opinion of the Comptroller that, as Herod was withdrawn from actual military service by his arrest made on account of a crime committed by him, on the general principle that pay follows services, he should not be paid for the time he was under arrest. The monthly pay of officers of the Army is prescribed by statute, and so long as a person is an officer of the Army he is entitled to receive the pay belonging to the office, unless he has forfeited it in accordance with the provisions of law, whether he has actually performed military service or not. The action of the President was an

Military Booty.

approval of the finding of the court, and a commutation of the sentence; and as this sentence necessarily implied that Herod was to be dismissed from the service, I do not think that the commutation of the sentence can be regarded as a remission of the dismissal implied in it.

I have the honor to be, &c.,

E. R. HOAR.

Hon. JOHN A. RAWLINS,
Secretary of War.

MILITARY BOOTY.

During the rebellion certain barges were impressed into the military service of the insurgent States, and continued in that service until their capture by the Army of the United States, after which they were retained for the use of the Quartermaster's Department: Advised that the barges are military booty, and belong wholly to the United States; that the War Department has the same right to dispose of them as of other property of the United States in its possession of a similar kind.

ATTORNEY-GENERAL'S OFFICE,

June 19, 1869.

SIR: I have received your letter of the 12th ultimo, in which you submit for my consideration the claim of David Clark, of North Carolina, to have delivered to him two barges now in the possession of the Quartermaster's Department of the Army. These barges are the "Hope" and the "Faith" or "Captain Goold." They were impressed in August, 1861, into the military service of the insurgent States during the late rebellion, and continued in that service until the capture of Norfolk, Virginia, by the troops of the United States in May, 1862. It is understood that the barges were then found by the troops lying in the harbor near a wharf, and were so far destroyed by fire as to be of little value. The Quartermaster's Department took possession of them, repaired them, and they have ever since been retained and used by that Department. Clark was, during the rebellion, a citizen of and had his domicile in North Carolina. He seems to have given no voluntary aid to the rebellion.

You ask my opinion "as to whether the War Department

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can legally continue to retain the barges or dispose of them for the benefit of the Government." As these barges were captured by the Army without, so far as appears, any co-operation on the part of the Navy, by the general principles of law they are to be regarded as military booty, and not as maritime prize of war. The act of August 6, 1861, (12 Stat., 319,) does not relate to property impressed into the service of the insurgents against the will of the owner. The act of March 3, 1863, (12 Stat., 820,) does not include property which has been used for carrying on war against the United States, "such as arms, ordnance, ships, steamboats, and other water-craft," &c.; and the act of July 22, 1864, (13 Stat., 375,) does not include property of the description of these barges. The 7th section of the last-named act has no relevancy; because, waiving the question of its application to property seized before the passage of the act, and the question whether the words "inland waters of the United States" include the harbor of Norfolk, the barges were not seized by the naval forces of the United States.

The barges are, therefore, simply booty captured by the Army from the enemy in war, and belong wholly to the United States. The personal loyalty of Mr. Clark is, in law, immaterial. The property was not captured by the Army from him.

I think the Department of War can legally continue to retain possession of the barges, and has the same right to dispose of them as of other property of the United States of a similar kind in its possession.

I have the honor to be, &c.,

E. R. HOAR.

Hon. JOHN A. RAWLINS,
Secretary of War.

CLAIMS FOR THE USE OF TURNPIKES IN TIME OF WAR.

The D., L. and N. Turnpike Company owned a turnpike in Kentucky, over which, during the late rebellion, large numbers of horses, mules, and wagons belonging to the United States, employed in transporting military supplies, were driven by the forces engaged in prosecuting the war; and for this use of their road the company were allowed and paid

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by the War Department one-half the rates of toll as established by the laws of the State, the company, however, receiving the same under protest, and claiming to be entitled to full rates of toll. Demand having since been made by the company for the difference between the amount thus received and the amount thus claimed: *Held* that this is substantially a claim to be paid for damages caused by the operations of war, and that under existing legislation no authority exists for allowing any part of it.

No government has ever admitted a strict legal obligation on its part to make full compensation for such injuries as are incidental to the actual operations of war.

ATTORNEY-GENERAL'S OFFICE,

June 22, 1869.

SIR: I have examined the question submitted for my opinion by your letter of April 28th ultimo. The facts as stated in the communication addressed to the Secretary of the Treasury by the Second Comptroller, dated April 10, 1868, are as follows:

The Danville, Lancaster and Nicholasville Turnpike Company is a corporation established by the laws of the State of Kentucky, and owns a turnpike in Kentucky about forty-three miles long. The State of Kentucky is the owner of a part of the stock, and persons and private corporations are owners of the remaining part. The rates of toll are established by the laws of the State of Kentucky. During the late rebellion the military officers of the United States established military camps on or near the line of this turnpike, and drove over it large numbers of horses, mules, and wagons, laden with military stores and munitions of war. The company charged the United States the rates of toll established by the laws of Kentucky, which, from August, 1861, to December, 1865, amounted, as the company alleges, to the sum of \$313,691.89, of which there was established, to the satisfaction of the Quartermaster-General and of the Department of War, the sum of \$277,609.12; and the Department of War, in accordance with a rule established by that Department to pay turnpike companies one-half the established rates, allowed and paid this company one-half of the last-named sum, viz., \$138,804.56, which the company received, protesting, however, at the time, as it had all along protested, that it was entitled to full tolls, and claiming to

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be paid the full amount of \$313,691.89. The demand of the company now is, to be paid the difference between the amount received and the amount originally claimed, viz., \$174,887.33.

You ask my opinion upon the legal right of the company to have this claim allowed and paid out of any existing appropriation.

It is certain that there was no express contract between the United States or their officers and the company, and that the company never assented to receive half tolls in full discharge of its claim for the use of the road. The company contends, as I understand, that the United States are liable to pay the rates of toll established by the laws of the State of Kentucky, and that, if not so liable, the United States must make "just compensation" for the use of the road, and the amount of this compensation is to be presumed to be the same as other persons made for the same use of the road; and that the Secretary of War had no right to fix this compensation at fifty per cent. of the established rates.

As the State of Kentucky was not declared to be in insurrection by the proclamation of the President of the date of July 1, 1862, and did not pass an ordinance whereby it attempted to withdraw from the United States, chapter 57 of the acts of Congress of February 21, 1867, (14 Stat., 397,) has no application to this claim. The company also contends that the first section of chapter 240 of the acts of Congress of 1864 (13 Stat., 381) relates only to the jurisdiction of the Court of Claims, and not to the power of heads of Departments and accounting officers, and that the claim is within the appropriation for the transportation of the Army, its munitions and stores; and if due by the United States should be allowed and paid out of that appropriation.

The fact that the State of Kentucky owns a part of the stock of the company, seems to me immaterial. When a State becomes the owner of stock in a private corporation, it has, in general, no greater rights in respect to the corporation than other owners of stock, and the corporation acquires no new rights in respect to strangers by reason of the State becoming one of its stockholders. It is well known that in many States roads are constructed by towns, cities, and counties, and sometimes by the State itself, at the public ex-

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pense, by taxation upon the inhabitants. In other States corporations are established for constructing and maintaining turnpikes, with the right to levy tolls on travelers. It will hardly be contended that roads built and maintained by taxation, even though owned by a town, city, or State, cannot be used by the United States for the marching of troops and the transportation of military supplies in time of war, except by permission of the State, or by paying the State such a sum for the use of the roads as it may think fit to ask. The armies of the United States cannot be excluded from a State by any such system of taxation. Nor can a State accomplish the same thing indirectly by creating turnpike corporations with the right to levy such toll as the State may establish.

The duty of the President to defend the people of the United States from all enemies, foreign and domestic, is imperative, and in time of war, as commander-in-chief of the Army, he has the right to march troops in whatever directions, and to fight battles in whatever places, within the limits of the United States, he thinks will best conduce to the successful prosecution of the war. Such a right is necessary for the performance of such a duty, and military officers in command of troops, subject to the orders of the President as their ultimate superior officer, must have the same right. In civil affairs, persons are invested with analogous rights as necessary for the performance of duties imposed on them by law. A sheriff, in the service of process, may rightfully enter private grounds to make an arrest. Persons authorized to locate a road may lawfully travel over land in the line of the location, for the purpose of making the survey; and perambulators of town boundaries have the same right in making the perambulations. Nor does a State ordinarily pay for damages thus caused. They are regarded as incidental to the performance of public duties, and a burden which may properly be left to be borne by the persons on whom it falls.

The right to subject the movements of the troops of the United States, in time of war, to the control of the legislative power of a State, to be exercised by means of laws imposing taxes upon travelers, is a pretension which has never

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been made by any State; and all persons and private corporations hold their property subject to the public rights of the United States. In the exercise of these public rights the United States may temporarily use property, or may take it for public use. If private property be taken for public use within the meaning of the fifth amendment of the Constitution, just compensation must be made; and a law purporting to authorize the taking without providing some means for determining what compensation is just, and of making such compensation, would be void, and no person could justify under it. But when private property is so taken for public use there is no implied contract on the part of the United States to pay the price which the owner asks. The United States, by the taking, do not assent to any terms that may have been proposed. They do not take by contract with or by the permission of the owner. They take by a paramount right, and are under an obligation to make just compensation therefor. And this claim really is, I suppose, that the use of the road in the manner stated was a taking of private property for public use, within the meaning of this amendment, for which the United States must pay just compensation.

That the Secretary of War cannot arbitrarily determine the amount of this compensation, if the United States are bound to make just compensation, is evident. But it seems hardly possible that the sum of \$138,804.56, already received by the company, is not full and abundant compensation for the use made of the road by the United States. If the last two clauses of the fifth article of the amendment to the Constitution are regarded as strict constitutional limitations upon the power of the Government, and are applicable to the damages to property incidental to the operations of war, then it follows that in war no person can be rightfully deprived of property without due process of law, and private property cannot be taken except in pursuance of some act of Congress authorizing the taking and providing for just compensation; and any person proceeding without the authority of such an act of Congress is a wrong-doer, and is personally liable for any damages caused by his action.

The absurdity of this conclusion shows either that these clauses are not applicable to damages to property incidental

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to the operations of war, or, if so applicable, they are, in reference to such application, declaratory of a moral duty on the part of Congress to make just compensation for such damages. If they are merely declaratory in their application to such damages, then it rests with Congress to make such compensation as it deems just. But the better opinion is, I think, that the clauses are not applicable to such damages to property.

I do not express any opinion upon the right of the proper officers of the Army or of the Department of War, arising from the usages of the service and the authority contained in the laws relating to the transportation of the Army and its supplies, to have made a contract with this company for the use of its road in transporting military supplies, or to have allowed the company such a sum for such use as these officers or that Department deemed just. But I confine myself to the claim of the company to be allowed, and paid out of any appropriation that has been made, in the absence of any such contract, any sum of money beyond what has been allowed them by that Department.

The taking of private property, for which just compensation must be made, has usually been confined to a voluntary taking for public use, and includes cases of taking real property for public use as well as personal property. Land on which permanent fortifications and buildings are erected has often been taken in this manner. But I know of no case where the temporary use of a road for the transportation of military supplies, rendered necessary for the purpose of carrying on actual military operations in time of war, has been deemed such a taking. Property may even sometimes be taken or destroyed by individuals under such circumstances of necessity that they are not held liable. It has been held that a man may rightfully throw overboard merchandise from a vessel to save life; may enter private grounds to save his own life; may erect military defenses on private grounds as a protection against an impending attack of public enemies; may destroy buildings in imminent danger of being burned by fire when necessary to stop a conflagration; and use the personal property of another to defend himself from an attack upon his life. This exemption of an individual from liability

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for the taking, and even the destruction of the property of another in these extreme cases, rests upon the necessary subjection of the right of private property to the higher considerations of human life and the public safety, and has some analogy to the doctrine already stated, that for injuries necessarily done to property by a public officer in the proper performance of his official duty, he is not responsible; and if these injuries are incidental to the actual operations of war, no government has ever admitted a strict legal obligation on its part to make full compensation.

In the case stated there was no permanent taking or appropriation of the turnpike by the United States; no appropriation of the franchise of the corporation, and no destruction of it; no exclusion of travel by persons not in the military service of the United States, and not enemies; and no interference with the right to take tolls from them, and, so far as appears, no use of the road longer or otherwise than actual military operations required. I cannot distinguish in principle this use of the road from the use of a battle-field by the troops of the United States, and I am unable to find any ground on which this claim can be maintained that will not authorize any loyal person who owned any of the land occupied by the Federal troops at the battle of Gettysburgh to claim damages for the injury to his crops, herbage, soil, and freehold sustained by such occupation. A distinction may be suggested that the necessity of using the road was less urgent; but no one can say that in a territory so near the scene of actual conflict as was this turnpike, its use by the military authorities in the manner stated was not essentially necessary for the successful prosecution of the war.

If the company is entitled to full compensation, it is only entitled to such an amount of money as will compensate it for the whole use of the road from 1861 to 1865, which is to be determined by the whole amount of damage suffered by the company, and not by any legislation of the State of Kentucky, which has fixed tolls which may be just for ordinary travel, but greatly more than is necessary for full compensation to the company when the road is used for the transportation of the supplies of a large army.

This is substantially a claim to be paid for damages to real

New Idria Mining Company.

property caused by the operations of war; and if the accounting officer should be of opinion that the company has not already received full compensation therefor, I yet do not think he is authorized by existing laws to allow any part of the claim. Claims of this character, when just compensation has not already been made, must be addressed to Congress, to be dealt with as, on considerations of public duty and public policy, it thinks best.

I have the honor to be, &c.,

E. R. HOAR.

Hon. JOHN A. RAWLINS,
Secretary of War.

NEW IDRIA MINING COMPANY.

The New Idria Mining Company, if entitled to a patent under the law, and are prepared to furnish the proper proof of it, have a right to have the question of their claim to such patent passed upon by the Interior Department, notwithstanding the request from a committee of one of the Houses of Congress for suspension of action.

When a right is created by law and a duty devolved upon an Executive Department under the same law, the enjoyment or enforcement of such right cannot be suspended at the request of a congressional committee. An Executive Department has no right to omit or delay the discharge of the duties imposed upon it by law at the request of a committee of a House of Congress; it can only pay attention to such request when it affects a discretionary power.

ATTORNEY-GENERAL'S OFFICE,
June 22, 1869.

SIR: I have the honor to acknowledge the receipt of your letter of the 16th instant, transmitting an executive document of the third session of the Fortieth Congress, being a letter from the Secretary of the Interior transmitting a copy of correspondence and other letters on file in the Interior Department relative to the claim to the land called "Panoche Grande," and the correspondence between yourself and the chairman of the Judiciary Committee of the House of Representatives, and between yourself and the Hon. William M. Evarts. Upon these papers you submit for my consideration the following questions:

New Idria Mining Company.

"1. Have the New Idria Mining Company a legal right to have the question of their claim to a patent passed upon, such that this Department is bound to consider and determine the same, notwithstanding the request from the Judiciary Committee of the House of Representatives for a suspension of action ?

"2. In general, to what extent is one of the Executive Departments authorized to delay action in carrying out the provisions of existing laws, upon the suggestion of a committee of one of the Houses of Congress that a proposition to change such laws will be submitted to that body ? How far has such a Department power to delay in such cases ?"

I have given these questions careful consideration, and am of opinion—

1. That if, as I understand, the New Idria Mining Company are prepared to establish, to the satisfaction of your Department, their claim under the statute of 1866, chapter 262, (14 Stat., 251,) to receive a patent for certain lands in California, they have a legal right to have the question of their claim to such patent passed upon, such that your Department is bound to consider and determine the same, notwithstanding the request from the Judiciary Committee of the House of Representatives for a suspension of action. Their claim, as I understand it, is of a title to land created by law. If under the law they have this title, and are prepared to furnish the proper proofs of it, the law gives them the right to a patent, and the issuing a patent is not made discretionary with the executive officers of the Government. The question, then, resolves itself into this, whether, when a right is created by law and a duty devolved upon an Executive Department under the same law, the enjoyment or enforcement of such right can be suspended at the request of a committee of the House of Representatives. I am unable to see that this result could be attained by any action even of the whole House of Representatives or of both branches of Congress, unless by a change in the law itself. To deprive any person of a right which the law creates at the request of anybody, would be a novel idea under a system of government which is supposed to be a government of laws and not of men. If it were a subject depending upon your discre-

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tion, where you might properly regard all the equities of the case, and the probability that a decision at one time or another might affect them favorably or otherwise, the probability that Congress would take material action upon the question involved might well have an important influence in determining your action, and the suggestion of a committee of Congress, or its chairman, would be justly entitled to great respect. But it cannot be that any person can rightfully be hindered in the enjoyment of his legal rights, upon the suggestion of a possibility that the law may at some time or other be changed.

I cannot suppose that the committee of the House of Representatives could have intended to ask you to delay your official action, except so far as it was a subject of your discretion, and would not involve the denial of a legal right. The answer to your question thus depends upon the fact whether the New Idria Mining Company have a right to their patent under the law.

2. The answer to your second question may be found in the suggestions already made. An Executive Department has no right to omit or delay the discharge of the duties imposed upon it by law at the request of a committee of the House of Representatives, and can only pay attention to such a request when it affects a discretionary power.

The papers submitted to me are herewith returned.

Very respectfully,

E. R. HOAR.

Hon. J. D. Cox,

Secretary of the Interior.

INTERNAL REVENUE.

Money recovered in a suit on an export bond given under the internal-revenue laws belongs exclusively to the United States, the same as money recovered in a suit on any other contract with the Government; and neither revenue officers nor informers can have any share therein. An export bond covering certain distilled spirits was subsequently canceled upon the production of a landing certificate; after which it turned out, on examination at the place of landing, that the barrels which contained the spirits were all, or nearly all, filled with water, in fraud of the revenue: Advised that a claim which has since been pre-

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further against the obligors in the bond, with respect to their liability in the matter, (no suit or proceeding in court having been commenced,) might be compromised by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury.

ATTORNEY-GENERAL'S OFFICE,

July 6, 1869.

SIR: I have the honor to acknowledge the receipt of your letter of January 26th, ultimo, in which you submit two cases for my opinion. The facts of the first case are, that in June, 1867, Charles S. Lord, of the firm of Nudd, Lord & Company, withdrew from an internal-revenue bonded warehouse, at San Francisco, California, a quantity of domestic distilled spirits, and entered the same for exportation at the custom-house, San Francisco. An export-bond of form Y in No. 9, series 3, of regulations concerning internal-revenue bonded warehouses, (1867,) was executed by Charles S. Lord, as principal, and Samuel Moore, as surety; and the spirits were laden on board the schooner "Sarah." The schooner went to sea, but the merchandise, or a part of it, was relanded within the United States contrary to law. A suit was brought on the bond in February, 1868, and judgment was subsequently rendered in the suit in behalf of the United States, for thirty-two thousand four hundred dollars, (\$32,400,) being one-half of the penalty of the bond, and, as it appears, the exact amount of the taxes imposed on the spirits by the internal-revenue laws, if they had been withdrawn for domestic consumption. The judgment was rendered by consent of the parties, the district attorney consenting on behalf of the United States, without having been previously authorized to do so. This action of the district attorney was subsequently approved by the Department of the Treasury. From the papers inclosed with your letter, it appears that this amount of thirty-two thousand four hundred dollars (\$32,400) was paid into the registry of the court in satisfaction of the judgment.

In this case you ask the two following questions:

- "1. Is the money received from the judgment in the case of the 'Sarah' to be treated as proceeding from a fine, penalty, or forfeiture, under the laws relating to customs, and, as such, subject to distribution under the act of March 2, 1867? (14 Stat., 546.)

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"2. If not, is the money so received to be regarded as a payment in satisfaction of the internal-revenue tax on the articles exported; or is it an internal revenue penalty, divisible under the provisions of the internal-revenue laws?"

The last question does not, as I understand, relate to the method in which the accounts of the Department are kept, and to the question whether the money received in satisfaction of this judgment is, in reference to these accounts, to be regarded as taxes collected on spirits or not; nor does it relate to the question whether the judgment is a bar in law against any proceedings to collect the tax from any person who would be liable to pay it, if this judgment had not been obtained and satisfied. But the question asked relates simply to the predicament of this money, in reference to its distribution in part among any officers of the customs, or persons claiming as informers.

This money was paid in satisfaction of a judgment recovered in a suit brought upon a contract under seal, voluntarily entered into by the defendants with the United States, and belongs to the United States exclusively as much as money recovered in a suit on any other contract with the United States. The word "penalty" is often used to express the sum of money in which the obligors of a bond acknowledge themselves bound, and the word "forfeiture" is also used in reference to a bond, to express that the obligors have become liable to pay this penalty. But these are widely different significations from the meaning of the words in those provisions of the laws relating to customs and internal revenue which grant to certain officers, or to informers, or to both, certain shares of fines, penalties, and forfeitures incurred by violations of law. Such fines, penalties, and forfeitures are recoverable by indictment, information, or a penal action, and are imposed by law as a punishment on the violators of it. Of moneys recovered in a suit on a contract with the United States, neither revenue officers nor informers have any share.

The facts of the second case submitted by you in the same letter are, that on May 10, 1867, Nudd, Lord & Co. withdrew from internal-revenue bonded warehouses, and entered at the custom-house at San Francisco for exportation by the steamer "Active" to Victoria, Vancouver's Island, certain barrels of

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alcohol distilled within the United States. An export-bond was executed by Nudd, Lord & Co., but it is not certainly known whether it was of the form of the export-bond mentioned in the first case, or of Form No. 136 in the general regulations of the Department of the Treasury, (1857.) A landing certificate in proper form was in due time produced to the collector of customs at San Francisco, and the bond was canceled. Subsequently the barrels, on being examined at Victoria, were all, or nearly all, found to contain water. Your letter then states that, "after negotiations with a member of the firm, the subject of which seems to have been the liability of the firm under the export-bond, that bond having been canceled on evidence, subsequently alleged to be fraudulent, of landing abroad, an arrangement was concluded between the collector of customs and the parties interested, by virtue of which seven thousand eight hundred dollars (\$7,800) were paid in settlement of the affair. This compromise has not thus far been ratified by the Department." You ask, "Does the agreement entered into in the case of the 'Active' require ratification as a compromise of a case arising under the internal-revenue laws, or should it be treated as a customs compromise?"

If two or more persons conspire together to defraud the United States of the internal-revenue taxes due on certain distilled spirits, by falsely pretending to export the spirits, and one or more of them do the acts stated in your letter in order to effect the object of the conspiracy, such persons would be liable to indictment under the 30th section of the act of March 2, 1867, (14 Stat., 484,) and this would, I think, be a case arising under the internal-revenue laws. I express no opinion whether any person, for the acts mentioned, would be liable to indictment under the provisions of any other act of Congress.

The liability of the obligors on the export-bond seems to me also a case arising under the internal-revenue laws. The right to require any export-bond, such as was taken, is given by the internal-revenue laws. The object of taking such a bond is to secure the United States against any fraud on the internal revenue, by relanding within the United States domestic distilled spirits that have been entered for exporta-

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tion, and on which the internal-revenue tax has not been paid. Such spirits, if relanded, might, and probably would, be put into consumption without the payment of the tax, and the bond is given to enable the United States to collect an amount of money at least equivalent to this tax of the exporter and his sureties who sign with him the bond, if he does not furnish the requisite evidence that the spirits entered for exportation have actually been exported according to the entry.

If the internal-revenue laws were repealed, such a bond could not legally be required, and no reason would exist why it should be required. It does not seem to me material whether the form of the bond actually given was that required by the customs regulations of 1857, or the internal-revenue regulations of 1867. As no suit or proceeding in court has been commenced on the bond given in the case of the "Active," the claim of the United States against the obligors can be compromised by the Commissioner of Internal Revenue with the advice and consent of the Secretary of the Treasury. If the money paid in the case of the "Active" is accepted by the Department, it may be desirable that the Department determine precisely the liability in discharge of which the money was paid and is accepted; as money received in discharge of an indebtedness upon a bond may be distributable in a different manner from money received in discharge of a liability to indictment.

Very respectfully, &c.,

E. R. HOAR.

Hon. GEORGE S. BOUTWELL,
Secretary of the Treasury.

CASE OF THE STEAMER WATHAN.

Where the loss of a steamboat has been caused by the carelessness of anybody, a claim for its value does not fall within the provisions of the 2d section of the act of March 3, 1849, as amended by the 5th section of the act of March 3, 1863.

By the terms of a charter-party, the United States agreed to make compensation to the owner of the chartered boat in case of her injury or destruction "by any event not incident to the navigation of the river

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or rivers on which she may be employed:" Held that the loss of the boat by sinking, in consequence of carelessness on the part of somebody or other, is not a loss by an event "incident to the navigation of the river," within the meaning of that agreement; that those words have substantially the same signification as the words "perils of navigation," or "dangers of the seas," or "dangers of navigation."

If the boat was lost through the negligence or carelessness of the employés or servants of the owner, the United States are not liable; but it would be otherwise if the loss occurred solely through the carelessness or negligence of the officers or agents of the Government.

ATTORNEY-GENERAL'S OFFICE,
July 6, 1869.

SIR: The letter of the Secretary of the Treasury dated February 27, 1869, submits to the Attorney-General for his opinion a question of law raised by the Second Comptroller in the case of the steamer Wathan. The question as stated by the Second Comptroller is, whether, upon the facts and evidence presented in the papers accompanying the letter, the United States are bound to pay the value of the steamer Wathan under the 2d section of the act of March 3, 1849, (9 Stat., 414.) The whole evidence in this case has not been submitted to the Attorney-General; and, if it had been, it is not his duty to weigh the evidence, but to give an opinion upon questions of law applicable to the evidence.

Among the papers accompanying the letter of the Secretary of the Treasury, are a report of the Third Auditor and an opinion of the Second Comptroller. In the report of the Third Auditor, there is what purports to be a full abstract of the evidence. This evidence intends to show that the steamer Wathan was chartered on the 17th of January, 1865, at Nashville, Tennessee, by a written charter-party executed by Moses Brown, as owner of the steamboat, and S. H. Stevens, assistant quartermaster of the United States volunteers, in behalf of the United States.

The second article of the charter-party is as follows: "The said Moses Brown hereby covenants and agrees that the master in command of said boat Wathan, during the time the same may be in the employ of the United States, shall obey all lawful orders from the proper officer of the Quartermaster's Department, and to have said boat Wathan at all times in readiness for service until discharged by proper

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authority." The fourth article is as follows: "Should the above-mentioned boat Wathan be injured, captured, or destroyed by the enemy, or by any event not incident to the navigation of the river or rivers on which *she* may be employed, then, in that event, the United States shall make a fair and just compensation for the injury or destruction of said boat Wathan."

The owner was to furnish the officers and crew of the boat; the United States were to furnish fuel, and to pay one hundred and twenty-five dollars per day for every day of twenty-four hours the boat was employed in the service of the United States; and the charter-party was to continue in force as long as the boat was required by the United States Quartermaster's Department.

This charter-party went into effect at 3 o'clock p. m., on the 17th of January, 1865. On the 19th of January, 1865, pursuant to orders previously issued by the quartermaster at Nashville, about two hundred and twenty-five head of cattle were hurriedly placed on board the boat. Mr. Brown, learning that it was the intention of the quartermaster to put these cattle on board for transportation, protested against their being put on board, unless suitable provisions were made by partitions or other means for confining the cattle in their places, and thus securing the proper distribution of them over the boat. But, against his protest, they were put on board in charge of four or five herdsmen, without, so far as appears, any partitions being built or other means provided for securing the cattle in their places. In the afternoon of the same day the steamer left Nashville for Eastport, Mississippi, bound down the Cumberland and Ohio Rivers, and up the Tennessee River. At about five o'clock on the following morning, while coaling at or near Clarksville, Tennessee, the cattle either rushed to starboard or were driven to that side of the boat, and this operating either alone or together with the weight of the coal taken on board, and said by some of the witnesses to have been improperly distributed, caused the boat to careen, fill with water, and sink; so that she was totally lost.

A large portion of the Auditor's report is taken up with an analysis of the evidence. So far as it tends to show negli-

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gence or carelessness either on the part of the officers and crew of the boat, or of the herdsmen, or of the officers of the Government, his conclusion is that it does not "establish, with reasonable certainty, that there was negligence either in the acts and directions of the officers of the boat with reference to the placing of the cattle, or in their conduct afterwards, except as hereinafter stated." This exception is a doubt in the mind of the Auditor whether it was not the duty of the officers of the boat to have so haltered the cattle as to have prevented the occurrence that led to the loss of the boat, on the failure of the Government officers to erect necessary barriers for securing the cattle, especially as there was sufficient time to have done so after the boat sailed and before she careened. The auditor also finds that the evidence shows carelessness and want of due attention on the part of the herdsmen, and that there is strong ground for ascribing the disaster, in part at least, to insufficiency in the provisions made by the officers of the Government at or before the commencement of the voyage, for the proper care and management of the cattle while *in transitu*.

In the previous part of his report the Auditor says: "As the contract between the parties contains no express undertaking by the owner for the transportation of cattle, or indeed for the performance of any special service, but merely shows a general hiring at a *per diem* compensation while in the employ of the United States, the obligation of the owner thereunder cannot be said to have extended further than to man, navigate, and keep his boat in readiness for *ordinary service*. Accordingly, if, in the course of its employment, any extraordinary outfit of the boat was required, as the erection of partitions, &c., or an additional force of men needed (beyond the regular crew and the ordinary requirements of navigation) for the care and preservation of the cargo, the duty and expense of procuring such outfit, or of providing such force, it would seem, properly devolved upon the Government, and not upon the owner. The latter, therefore, had a right to call upon the Government to make whatever extra outfit or provision was reasonably necessary for the proper distribution, security, and management of the cattle while on board the transport; and if there was any

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failure in this respect, it certainly cannot be imputed to any negligence of his." This seems to me a complete answer to the question of doubt in the mind of the Auditor already stated, as it does not appear that halters had been provided by the Government for the purpose of securing the cattle, or that the boat had previously been supplied with them.

The Comptroller, in his opinion, says, "There is a contest between the herdsmen and the officers and crew as to which party was in fault. Each swears rigorously to the mal-conduct of the other, and, so far as relates to the utter carelessness of both, I have entire faith in their veracity." He is of opinion that the "event by which she [the boat] was lost was clearly incident to the navigation of any river, she having been capsized through the gross and admitted negligence of somebody or everybody on board."

The single question presented by the Secretary of the Treasury is, Whether the claim for the value of the boat thus lost is to be allowed and paid under the 2d section of the act of March 3, 1849, (9 Stat., 415,) as amended by the 5th section of the act of March 3, 1863, (12 Stat., 743.)

It seems admitted that the boat was lost by somebody's carelessness, and not by an unavoidable accident, or by capture, or destruction by an enemy, or by abandonment or destruction by the order of any officer of the Army; and the claim is not, therefore, within the provisions of these acts of Congress. But I am unwilling to confine my opinion to this single question; because I do not think that the loss of a boat by sinking, in consequence of carelessness on the part of somebody or other, is necessarily a loss by an event incidental to the navigation of a river, within the meaning of those words in the charter-party. I think those words mean substantially the same as the words "perils of navigation," or "dangers of the seas," or "dangers of navigation." The United States by the charter-party engaged to pay just compensation for any injury to, or for the destruction of the boat, if she was injured, captured, or destroyed by the enemy, or by any event not incident to the navigation of the river or rivers on which she may be employed. If the boat was lost by the carelessness of the officers or crew, being agents of the owner, and not acting under explicit lawful

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orders from the proper officers of the Quartermaster's Department, the United States would not be held liable. But the United States having, by the express words of the charter-party, taken all other risks than those named, must be held liable for the loss of the boat, if proximately caused, not by any natural accident incident to the navigation of the river, but by the carelessness or negligence of their own officers or agents, and there was no carelessness or negligence on the part of the owner or his agents that directly contributed to the loss, and without which the loss would not have happened.

I have the honor to be, very respectfully, your obedient servant,

E. R. HOAR.

Hon. GEO. S. BOUTWELL,

Secretary of the Treasury.

CASE OF JESSE D. BRIGHT.

B., the owner of land, leased it to H., with the privilege of purchasing an interest therein at a certain price during the term, and also with the privilege of letting it to the Government for a reasonable time beyond the term; the lease contained a provision that if the lessee should not elect to purchase during the term, his contract with the Government, in case the land were let thereto, should be transferred to the lessor; the land was let to the Government for such period as it might be required thereby; and the term of the original lease having subsequently expired, and it being a disputed fact whether the lessee had elected to purchase within the term or not: Advised that if a new lease of the premises is desired by the Government it should be entered into with B., and not with H.; but that the rent due under the existing contract between the Government and the latter, which has accrued since the expiration of the original lease, cannot, under the circumstances, safely be paid to the former.

ATTORNEY-GENERAL'S OFFICE,

July 12, 1869.

SIR: I have received your letter of the 7th of June last, in which you ask whether, in my opinion, "under the circumstances and evidence of the case, as set forth in the reports of Deputy Quartermaster-General James A. Ekin, dated May 12 and 28, 1869, the War Department can safely recognize

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Mr. Bright as owner, in severalty, of the property by paying to him the accrued rent, and entering into a contract with him in regard to the future occupation of the whole or a part of the land." This land is a lot of about one hundred and seventeen and a half acres, situated near Jeffersonville, Indiana.

I understand the facts to be as follows: On the 1st day of June, 1863, Jesse D. Bright and his wife let the premises in question by written lease to Eusebius Hutchings and Alfred Harris, at an annual rent of \$1,440, for the term of five years. It was expressly agreed in the lease that the lessees should have the right to let the premises to the United States "for such reasonable time as the Government may desire, extending even beyond the time of this lease." It was also agreed that the lessees might have the right at any time during the term to purchase an undivided two-thirds part of the premises at a certain price per acre, and that in case they should let the premises to the Government for a longer term than five years, and should not within that term elect to purchase an undivided two-thirds part of the premises, their lease to the Government should be transferred to Mr. Bright, and the entire benefit thereof inure to him. On the same 1st day of June, 1863, Hutchings and Harris let the premises to the United States by written lease "for the space of three years, and such longer time as may be required by the Government of the United States," at an annual rent of \$25 per acre, or \$2,937.50 for the entire lot. Under this lease the Government took possession, and has been in possession ever since. The United States have paid the rent due to Hutchings and Harris up to the 1st of June, 1868, but from that time the rent has not been paid.

That Mr. Bright was seized in fee of the premises when these leases were executed is conceded, and it does not appear that he has conveyed to any other person any interest in any part thereof. It is in dispute whether Hutchings and Harris within the term of the five years elected to purchase an undivided two-thirds part of the premises, and whether they now have any rights under that agreement. It seems, then, that if Hutchings and Harris have any interest in the land, it is an equitable and not a legal interest, and that if

Case of Jesse D. Bright.

any lease is now to be executed by the United States with anybody for the whole or any part of these premises, it should be executed with Mr. Bright, and not with Hutchings and Harris; that as, by the lease of Bright to Hutchings and Harris, they have the right to let the premises to the United States for such time as the Government may desire, extending even beyond the term of five years, and as, in pursuance of this agreement, Hutchings and Harris let the premises to the United States for the space of three years, and such longer time as may be required by the United States Government; and as, under this lease, the United States have held possession until the present time, they cannot safely pay the rent already accrued and unpaid to Mr. Bright. Their contract was not with him, but with Hutchings and Harris, persons to whom he gave the right to make the lease.

Whether the United States can safely pay this rent to Hutchings and Harris, against the protest of Mr. Bright, is a very different question, as in case Hutchings and Harris did not elect to purchase an undivided two-thirds part of the premises within the term of five years, their lease to the Government was to be transferred to Mr. Bright, and the entire benefit thereof inure to him. If Hutchings and Harris did not so elect, Mr. Bright has at least an equitable interest in the rent unpaid; and I cannot advise the payment of this rent to Hutchings and Harris without the consent in writing of Mr. Bright, or without the execution of a suitable bond by Hutchings and Harris, with sureties, to indemnify the United States against all loss if the rent is paid to them.

Hutchings and Harris were authorized to let the premises to the United States for such reasonable time as the Government may desire, extending even beyond the term; and they did let the premises to the United States for the space of three years, and for such longer time as may be required by the United States. The three years expired on the 1st day of June, 1866, and the five years on the 1st day of June, 1868. Whether the United States can longer lawfully hold possession of these premises against the will of Mr. Bright, I do not express an opinion, because I am informed that, if the United States desire a lease of the whole or any part thereof at as

Main Line of the Pacific Railroad.

low a rent as that which they now pay, Mr. Bright is willing to execute such a lease.

I have the honor to be, very respectfully, your obedient servant,

E. R. HOAR.

Hon. JOHN A. RAWLINS,
Secretary of War.

MAIN LINE OF THE PACIFIC RAILROAD.

The main line of the Pacific Railroad, intended in the 11th section of the act of July 1, 1862, (12 Stat., 495,) commences at the one hundredth meridian of longitude west from Greenwich, and terminates at the eastern boundary of the State of California.

ATTORNEY-GENERAL'S OFFICE,
July 12, 1869.

SIR: By your letter of the 25th of June, 1869, you submit for my construction the 11th section of the act of Congress entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," approved July 1, 1862, in which it is provided that no more than fifty thousand of said bonds [for \$1,000 each] shall be issued under this act to aid in constructing the main line of said railroad and telegraph, and request me to give you my opinion "as to what constitutes the main line of said railroad and telegraph, indicating the point of its commencement on the east and of its termination at the west."

I have given the question careful consideration, and am of the opinion that, by the true construction of the statute referred to, the main line of the Pacific Railroad intended in the 11th section thereof commences at the one hundredth meridian longitude west from Greenwich, and terminates at the eastern boundary of the State of California.

I have the honor to be, &c.,

E. R. HOAR.

Hon. GEO. S. BOUTWELL,
Secretary of the Treasury.

Citizenship.

CITIZENSHIP.

A woman born in the United States, but married to a citizen of France and domiciled there, is not "a citizen of the United States residing abroad," within the meaning of those words in the 116th section of the act of June 30, 1864, and the 13th section of the amendatory act of March 30, 1867, relating to internal revenue.

ATTORNEY-GENERAL'S OFFICE,

July 12, 1869.

SIR: The letter of the Secretary of the Treasury of September 15, 1868, submits to the Attorney-General for opinion the question, whether an "American woman born in the United States, residing in France, and married there to a citizen of France, is, by reason of such marriage, to be regarded as having lost her American citizenship."

The Secretary's letter refers to the opinion of Attorney-General Stanbery, of August 13, 1866, in the case of Madame Berthemy, and the question is asked in order to determine whether women who are citizens of the United States by birth, but who are married to citizens of France and reside in France with their husbands, are citizens of the United States residing abroad within the meaning of section 116, chapter 173, acts of 1864, (13 Stat., 281,) as amended in section 13, chapter 169, acts of 1867, (14 Stat., 477.) The words of this section, so far as they are material, are "that there shall be levied, collected, and paid annually upon the gains, profits, and income of every person residing in the United States, or of any citizens of the United States residing abroad, whether derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation, carried on in the United States, or elsewhere, or from any other source whatever, a tax of five per centum on the amount so derived over one thousand dollars, and a like tax shall be levied, collected, and paid annually upon the gains, profits, and income of every business, trade, or profession carried on in the United States by persons residing without the United States and not citizens thereof."

It appears from the papers on file in this office, that the opinion of Mr. Stanbery, in the case of Madame Berthemy,

Citizenship.

was given in reference to her liability to pay an income tax under said section 116, as amended in section 1, chap. 78, acts of 1865, (13 Stat., 479.) In his opinion, Mr. Stanbery states the question to be, whether Madame Berthemy is a citizen of the United States or of France. The facts were, that she was born in France; that her father, at the time of her birth, was a citizen of the United States; that she married in France a French citizen, who subsequently deceased; that she never contracted a second marriage, and then was, and always had been, domiciled in France. Mr. Stanbery takes notice of the act of Congress of February 10, 1855, and of the code of France, by the provisions of which persons born in France, of the citizens of other nations, are not citizens of France by the mere fact of birth, but, to become French citizens, must, during the year following their majority, comply with certain formalities required by the code; and an alien woman marrying a French citizen follows the condition of her husband, and becomes, by such marriage, a citizen of France. It did not appear that Madame Berthemy had, during the year following her majority, complied with the formalities required by the code to make her a French citizen, and Mr. Stanbery puts his opinion distinctly upon the fact of her marriage, and decides that she is a citizen of France. He does not expressly, but only inferentially, decide that she is not a citizen of the United States. This opinion of Mr. Stanbery is, therefore, directly in point, and decides that a woman, a citizen of the United States, domiciled in France and marrying there a citizen of France, is not a citizen of the United States residing abroad, within the meaning of those words in said 116th section.

I do not propose to discuss the general question of the right of expatriation under our laws, or to express any opinion whether a woman who is by birth a citizen of the United States, and by marriage has become a citizen of France, is not after such a marriage a citizen of the United States in a qualified sense; but, as the opinion of Mr. Stanbery has interpreted the words, "citizen of the United States residing abroad," in the 116th section of the internal-revenue law, to mean exclusive citizenship, and not to include women domiciled abroad, who have become citizens of a foreign country

West Point Academy.

by marriage, and as the laws of the United States have adopted the policy of permitting women to acquire citizenship by marriage, by enacting that any woman who might lawfully be naturalized under the existing laws, married, or who shall be married, to a citizen of the United States, shall be deemed and taken to be a citizen, I prefer, for the purpose for which my opinion is requested, to adhere to the conclusion reached by Mr. Stanbery.

I have the honor to be, very respectfully,

E. R. HOAR.

Hon. GEORGE S. BOUTWELL,
Secretary of the Treasury.

WEST POINT ACADEMY.

In general, minors whose fathers are living and residing within the United States are, by reason of their minority, ineligible to appointment as cadets to the Military Academy at West Point from any other congressional districts than those in which their fathers reside.

ATTORNEY-GENERAL'S OFFICE,

July 17, 1869.

SIR: Your letter of the 3d inst., concerning the right of certain persons named in the papers accompanying the letter to be appointed and admitted as cadets into the Military Academy at West Point, has been received and considered by me. None of these young men has reached his majority, and it does not appear that any of them has been emancipated; and it does appear that each has a father living, and having an actual residence within the United States.

The 2d section of the act of Congress of March 1, 1843, (5 Stat., 606,) provides, among other things, "that hereafter in all cases of appointments of cadets to the West Point Academy, the individual selected shall be an actual resident of the congressional district of the State or Territory or District of Columbia, from which the appointment purports to be made."

The residence of a minor is, as a general rule of law, the residence of his father, if he have one living who has a residence within the United States; and no facts are stated by

National Cemeteries.

you in reference to any of these persons that constitute an exception to this general rule. The law in this respect is so fully set forth in the opinion of the Judge-Advocate-General, accompanying your letter, that I deem it unnecessary to do more than refer to that opinion.

None of these minors is, therefore, upon the facts you state, eligible to an appointment as a cadet from any congressional district in which his father is not actually a resident. In regard to any young men who have already received an appointment, I can see no reason for opening the question as to their residence. That was a fact to be decided at the time the appointment was made, and it is to be presumed was decided correctly.

I have the honor to be, &c.,

E. R. HOAR.

Hon. JOHN A. RAWLINS,
Secretary of War.

NATIONAL CEMETERIES.

Congress cannot acquire or assert exclusive jurisdiction over any part of the territory of a State without the consent of the State legislature; and hence, before such jurisdiction over a national cemetery can become vested in the United States, the consent of the legislature of the State in which the cemetery is situated must be obtained, notwithstanding the provision of section 6 of the act of February 22, 1867, chap. 61.

But to authorize payment for land appropriated for the purpose of a national cemetery under that act, the consent of the legislature of the State in which the land lies is not necessary; nor, in such case, is the opinion of the Attorney-General as to the validity of the title required, though, as a prudential measure for the security of the Government, it would seem to be highly expedient to obtain his opinion.

Where compensation has been paid for land thus acquired for a national cemetery, without having obtained the consent of the State legislature to the acquisition, the proper course to be taken is for the Secretary of War to apply to such legislature for its consent.

ATTORNEY-GENERAL'S OFFICE,

July 29, 1869.

SIR: I have the honor to acknowledge the receipt of your letter of May 20, 1869, asking my opinion upon several questions therein contained.

National Cemeteries.

The first is, "Whether the act of February 22, 1867, to establish and protect national cemeteries, is competent to vest in the United States exclusive jurisdiction over lands acquired for such purposes?"

Section 4 of that act provides for the purchase by the Secretary of War from the owners thereof, at such price as may be mutually agreed upon between the Secretary and such owners, such real estate as in his judgment is suitable and necessary for the purpose of carrying into effect the provisions of the act; and, in case of failure to agree upon the price to be paid, or to obtain from the owner a title in fee simple for the same, the Secretary of War is authorized to enter upon and appropriate any real estate which, in his judgment, is suitable and necessary for the purposes of the act. A provision is made in the following section for an appraisement of the value of any real estate thus entered upon and appropriated; and by section 6 it is enacted that the fee simple of all real estate thus entered upon and appropriated, of which appraisement shall have been made, shall upon payment to the owner or owners of the appraised value, or, in case of their neglect for thirty days to demand the same, upon the appraised value being deposited in the court making such appraisement, "be vested in the United States, and its jurisdiction over said real estate shall be exclusive and the same as its jurisdiction over real estate purchased, ceded, or appropriated for the purposes of navy-yards, forts, and arsenals."

The only clause in the Constitution of the United States by which Congress is authorized to acquire exclusive jurisdiction over the territory of any part of the separate States of the Union, is found in Article I, section 8, and is in these terms: "The Congress shall have power * * * to exercise exclusive legislation in all cases whatsoever, over such district not exceeding ten miles square as may by cession of the particular States and the acceptance of Congress become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, arsenals, dock-yards, and other needful buildings."

National Cemeteries.

I am of opinion that, under this provision of the Constitution, there is no power in Congress to acquire or assert exclusive jurisdiction over any part of the territory of any State without the consent of the legislature of the State; and that, in order to acquire exclusive jurisdiction over a national cemetery, the consent of the legislature of the State in which the same is situated must first be obtained. I have no doubt that, as incident to the power of making war, the National Government has the power to bury the dead who have fallen in battle, and to appropriate for this purpose such lands as are necessary, to hold such burial-places, and to protect them from desecration. If the consent of the legislature of the State in which the burial place is situated can be obtained, I think it might well be held to be included under the terms of the constitutional provision above cited, and exclusive jurisdiction over it to be thus acquired.

Your second and third questions are: "Whether, under the requirements of the joint resolution of September 11, 1841, the title papers of such lands are to be submitted to the Attorney-General for his opinion as to their validity; and whether under the joint resolution just cited this (the War) Department is legally estopped from paying any money for land purchased for cemeterial purposes until the consent of the State legislature to its acquisition by the United States has been obtained?"

The joint resolution of September 11, 1841, contemplates purchases of lands for all public purposes, and establishes, as a general rule applicable to them, that no public money shall be expended in the purchase until the opinion of the Attorney-General on the validity of the title shall be obtained, and the consent of the legislature of the State in which the lands are situated is given. But no reference is made to the joint resolution of 1841 in the act of 1867; and the subject-matter of this act, as well as some of its provisions, lead me to the conclusion that no reference to the joint resolution was intended. The national cemeteries had been already practically established in many cases by their relation to the battle-fields of the war. The act provides for taking and holding them without the consent of the owner, and I cannot

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suppose that it was the intention of Congress that the owner should be deprived of his land without compensation because the consent of the legislature of the State might not be given to the appropriation of the land to public use by the national authority. The resolution of 1841 refers only to lands to be purchased by the United States. The statute of 1867 contemplates not only purchase, but appropriation under the right of eminent domain. As, therefore, I do not think that the consent of the legislature of the State in which the lands are situated is necessary to authorize payment for the lands selected for national cemeteries, it follows that the opinion of the Attorney-General as to the validity of the title to be acquired, the necessity for which depends upon the same section of the resolution of 1841, cannot be considered essential. But I think it would be highly expedient and proper for the Secretary of War to submit the title to be acquired to lands designated as national cemeteries to the Attorney-General for his opinion. When money is to be paid, of course the question to whom it is to be paid—that is, the question in whom the title in fee to the land is vested—must always arise; and for the safety of the Government, and to avoid possible controversies among different claimants, it would seem to be expedient that the usual course of investigating titles should be adopted. It is not, however, in this case, in my opinion, absolutely required by law.

You further ask my advice as to the best measures to adopt, if any be necessary, to perfect the title and jurisdiction of the United States in those cases where the purchase-money has been paid before the consent of State legislatures could be obtained. As the act of 1867 shows that it was the intention of Congress that exclusive jurisdiction over the national cemeteries should be obtained by the United States, and as I am of opinion that this can only be acquired by obtaining the consent of the legislatures of the State, I must suppose it to be the intention of Congress that such consent should be asked, and that it would be a proper course for the Secretary of War to apply to the respective legislatures for their consent, the procurement of which would make the act of 1867 completely operative. Such a course was indicated

Oath of Office in Virginia.

in the 6th section of the joint resolution of 1841 to be adopted in similar cases then existing.

The papers are herewith returned.

Very respectfully, your obedient servant,

E. R. HOAR.

Hon. JOHN A. RAWLINS,

Secretary of War.

OATH OF OFFICE IN VIRGINIA.

The oath prescribed by the act of July 2, 1862, and by the act of July 19, 1867, section 9, is not to be required of the officers of the State of Virginia, or members of the legislature elected under its new constitution, after Congress shall have approved the constitution and restored the State to its proper place in the Union.

Before Congress has thus acted, the members of the legislature so elected may come together, organize, and do whatever is required by the acts of Congress as preliminary to the reconstruction of the State, without taking the oath referred to; but they cannot, without violation of law, be allowed to transact any business or assume any other function of a legislature, if the oath has not been taken by them.

ATTORNEY-GENERAL'S OFFICE,

August 28, 1869.

SIR: I have the honor to acknowledge the receipt of your letter of July 27, 1869, in which you request my opinion "upon so much of the questions submitted in the letter of the commanding general of the first military district, dated the 10th instant, and accompanying papers, copies of which are inclosed, as refers to the legal qualifications of officers to be elected under the proposed constitution of the State of Virginia, and especially upon the question whether persons elected to office in such State, under said constitution, are required by the supplemental reconstruction act of July 19, 1867, to take and subscribe to the oath prescribed or referred to in section 9 of said act, before entering upon the duties of their respective offices."

The latter question is the only one indicated with such distinctness as to enable me to be fully satisfied that its purport is apprehended, and I therefore confine my answer to that.

Oath of Office in Virginia.

By the statute of April 10, 1869, (16 Stat., 40,) the registered voters of Virginia were authorized to vote on the question of the adoption of a constitution for the State, and at the same time to elect officers under it, subject to the approval of Congress. The vote has been taken in pursuance of the provisions of the act, and the election held; and some parts of the constitution submitted have been adopted by the people, and others rejected. The parts of the proposed constitution thus adopted, if they shall be approved by Congress, will be the constitution of Virginia, under which all its officers will be required to act; and the qualifications as well as the duties of those officers will be determined by it. When Virginia is restored to its proper relations to the country as a State of the Union, its officers and legislature will be such as the constitution of the State provides, deriving their powers from that instrument; and it will clearly not be in the power of Congress to impose any requirement of additional qualifications upon them, different from those which under the Constitution of the United States may be required in all the States. If, therefore, any tests were to be imposed upon members of the legislature not provided by the constitution of Virginia, or any restriction imposed upon the people of the State in their choice of officers, not recognized by it and not made applicable under the legitimate power of Congress to all the States, the legislature and officers would not, in my opinion, be the legislature and officers of Virginia under its constitution. I do not see that Congress can undertake to furnish the State with a suitable legislature to start with, or to exercise any control over its composition which could not be exercised over subsequent legislatures. I am therefore of opinion that the oath prescribed by the statutes of 1862, and by the statute of July 19, 1867, chapter 30, section 9, required to be taken by all persons "elected or appointed to office in said military districts, under any so-called State or municipal authority," is not to be required of the officers of the State of Virginia, or members of the legislature elected under its new constitution.

It does not seem to me that the provisions of this 9th section, which are applicable to the government of the State under military authority, were intended to apply to the legis-

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lature and officers under whom the State is to be restored to its proper relations to the Union, and by whom the government of the State is to be administered after its restoration. This opinion is strongly confirmed by a reference to the 2d section of the same act, which authorizes the commander of any district named in the act "to suspend or remove from office, or the performance of official duties and the exercise of official powers, any officer or person holding or exercising, or professing to hold or exercise, any civil or military office or duty in said district under any power, election, appointment, or authority derived from, or granted by, or claimed under, any so-called State or government thereof," and to detail a competent officer or soldier of the Army to perform such duties.

It would be impossible to suppose that Congress could intend that a legislature under the constitution of a State could have its members appointed by a detail from soldiers of the Army. The only reasonable conclusion seems to me to be, that it was not intended that any such legislature should be allowed to exist and act until reconstruction was completed, except for the limited and qualified purposes requisite to reconstruction.

But, on the other hand, I fully concur with the view of the general commanding in Virginia, that under the reconstruction acts of Congress no officer or legislator is competent or should be permitted to exercise any of the functions or powers of his office within that State, except so far as those acts themselves provide, without taking the oath which is referred to in the statute of 1867, above quoted. The act of April 10, 1869, requires the legislature to meet at a time which it designates. That it is to meet implies that it is to come together for some purpose. It is required under the previous law to act upon the question of adopting the fourteenth amendment to the Constitution of the United States before the admission of the State to representation in Congress. I am of opinion, therefore, that it may come together, organize, and act upon that amendment; but that, until Congress shall have approved the constitution and the action under it, and shall have restored the State to its proper place in the Union by recognizing its form of government as republican, and admitting

Claim of James D. Boylan.

it to representation, the legislature is not entitled, and could not, without violation of law, be allowed to transact any business, pass any act or resolve, or undertake to assume any other function of a legislature, if the test-oath has not been required of its members; and that no officer elected under the new constitution can enter upon the duties of his office without taking the oath while military government continues.

Very respectfully,

E. R. HOAR.

Hon. JOHN A. RAWLINS,
Secretary of War.

CLAIM OF JAMES D. BOYLAN.

The provisions of the 97th section of the internal-revenue act of June 30, 1864, relative to the discharge of duties upon articles delivered to the United States under contract, where such duties were imposed subsequent to the date of the contract, are limited to additional duties on the articles contracted to be delivered, and do not include additional duties imposed upon articles used in the manufacture of the articles so contracted to be delivered.

Accordingly, a person who contracted before the passage of the act of June 30, 1864, to furnish army clothing to the Government after its passage, is discharged from payment of the two per cent. additional tax imposed by that act upon clothing, but not from payment of any additional taxes imposed upon the yarn or cloth used in its manufacture.

ATTORNEY-GENERAL'S OFFICE,
September 6, 1869.

SIR: I have considered the question of law submitted to the Attorney-General by the Secretary of the Treasury in his letter of July 15, 1868.

James D. Boylan, at different times prior to June 30, 1864, contracted with the United States to furnish army clothing at certain prices named in the contracts. This army clothing was delivered after June 30, 1864. In order to manufacture the clothing, Boylan, prior to June 30, 1864, executed contracts with different persons for furnishing him with cloth at certain prices named in these contracts, and this cloth was delivered to him after June 30, 1864. No one of these contracts contained any provision "for the payment of duties

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imposed by laws enacted subsequent" to its date. Boylan claims to have refunded to him the additional tax imposed by the internal-revenue act of June 30, 1864, upon the quantity of cloth delivered to him after the passage of the act. He makes this claim under the 97th section of the act, (13 Stat., 273.) The provisions of this act imposing taxes upon cloth and ready-made clothing are found in the 94th section, (13 Stat., 269, 270.) By these provisions it is plain that the tax imposed upon ready-made clothing is distinct from the tax upon cloth, and is a tax of five *per cent.* upon the whole value of the clothing, and not merely upon the increased value, and is additional to the tax imposed upon the cloth out of which the clothing is made, or upon the yarn out of which the cloth is made.

It is understood that the taxes on cloth, which, so far as they were imposed by the act of June 30, 1864, Mr. Boylan asks to have refunded, were legally due from, and actually paid by, the different persons with whom Boylan made the contracts. This cloth was manufactured by other persons than Boylan, and the taxes upon it were, by the express words of the 94th section, "to be paid by the producer or manufacturer." The amount of these additional taxes these persons are by the 97th section empowered to add to the stipulated price, and to sue for and recover of Boylan; and it is not known, but it is assumed, that this amount has been paid them by Boylan.

By the proviso of the 97th section, when the United States are the purchasers "under such prior contract, the certificate of the proper officer of the Department by which the contract was made, showing, according to regulations to be prescribed by the Secretary of the Treasury, the articles so purchased by the United States, and liable to such subsequent duty, shall be taken and received, so far as the same is applicable, in discharge of such subsequent duties on articles so contracted to be delivered to the United States, and actually delivered according to such contract." A copy of the regulations prescribed by the Secretary of the Treasury under date of November 4, 1864, pursuant to this proviso, was inclosed with the letter submitting this case to the Attorney-General, and in this letter the Secretary says, "I am in doubt whether

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such regulations, in so far as they relate to sub-contractors, were authorized by law, and I have to request your opinion as to the legality of refunding in this and similar cases."

I desire not to express any opinion upon the right of the Secretary of the Treasury to prescribe these regulations under the authority granted in the proviso of the 97th section; but I propose to confine my opinion to the actual case of Boylan.

The proviso authorizes the Secretary of the Treasury to prescribe by regulations the manner in which certain facts shall be shown; but whether the facts thus shown entitle the person of whom the United States are the purchasers to be discharged of "the subsequent duties on articles so contracted to be delivered," is a question of law. Is Boylan's case, as herein stated, within the meaning of the 97th section? His claim is to have a certain amount of money paid to him by the United States. The 97th section enacts, in cases that fall within it, that the prescribed certificate shall be taken and received in discharge of such subsequent duties, but does not enact that such duties, if paid, shall be paid back. But if Boylan's case is substantially within the meaning of the 97th section, the payment of the additional duties being discharged by the prescribed certificate, the amount so paid should then be paid back pursuant to regulations prescribed under the authority of the 44th section of the same act, as duties collected excessive in amount.

By the 75th section of the act of July 1, 1862, (12 Stat., 465,) the duty on cloth was fixed at 3 per cent. *ad valorem*; and by the last paragraph of the same section of the same act, a duty of 3 per cent. *ad valorem* was imposed on all manufactures of cotton, wool, &c., "not in this act otherwise provided for," and, by the Commissioner of Internal Revenue, clothing was held to be a manufacture within the meaning of this paragraph, and taxable at 3 per cent. *ad valorem*; so that by the act of June 30, 1864, an additional duty of 2 per cent. *ad valorem* was imposed both upon cloth and clothing. The provisions of section 97 are exceptional and unusual in revenue laws. The reason of these provisions is, that the increased taxation could not have been in the minds of the parties to the contract when the price was agreed upon, and

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therefore Congress thought that the vendor ought not to be compelled to pay the tax and deliver the merchandise at the agreed price, and that as the imposition of taxes upon the manufacture of articles usually has the effect of increasing their market-value, the additional taxation should fall upon the purchaser.

The last proviso of the 69th section of the act of July 1, 1862, (12 Stat., 460,) was the first provision in the internal-revenue laws, of this kind, under which the taxes in the cases that fall within it were levied upon the purchaser. As it was found in practice inconvenient for the United States to look directly to the purchasers for the payment of the tax, the 97th section of the act of June 30, 1864, was enacted, which left the liability of the manufacturer to pay the taxes to the United States unchanged, but gave him a right of action to recover an equivalent amount of the purchaser, and when the United States were the purchasers, in order to save the payment and repayment of the money, it was enacted that a certificate of the requisite facts should be received in discharge of the additional taxes. It was well known to Congress that, by the internal-revenue laws, taxes were imposed upon manufactures that were constituent materials of other manufactures also taxed, or that when the process of manufacture was continuous taxes were imposed upon different forms through which the manufactured article passed in the process of manufacture; for instance, that a tax was imposed upon yarn used for weaving, upon the cloth made from this yarn, and upon clothing made from this cloth; and that these taxes were distinct from each other, and were sometimes *ad valorem* taxes upon full values, and sometimes upon increased values. Now, a person contracting on the 1st of June, 1864, to furnish army clothing to the United States on the 1st of January, 1865, might himself manufacture the cloth and the clothing, either before or after the passage of the act of June 30, 1864, or might purchase the cloth either before or after, and this purchase might be accompanied by immediate delivery, which might be also either before or after the passage of the act, or the cloth might be delivered after the contract of purchase, and either before or after the passage of the act. A contractor might have completed the

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manufacture of the clothing before the passage of the act, and delivered it afterward. Upon all the materials manufactured by the contractor, and used in producing the article sold, the taxes were assessable at the time these materials were used and consumed. Upon all materials bought of other persons, the taxes were assessable upon such other persons at the time the materials were delivered.

In this state of things it was competent to Congress to enact that the contractor with the United States should be paid by the United States, in addition to the agreed price, all taxes imposed by law upon the manufactured article or any of its constituent materials, between the date of the contract and the time the articles were by the contract to be delivered, or were actually delivered; or that so much of these additional taxes on either the manufactured article or its constituent materials, as he had himself paid, should be paid back to him; or that so much only of these additional taxes as were imposed upon the articles contracted to be delivered, and not including the taxes imposed upon other manufactures used in the manufacture of these articles should be paid back; or that a certificate of the requisite facts, should be received in discharge of such payment. I think Congress had all these possibilities in view when the 97th section was passed, and intended to limit the discharge from the payment of duties subsequently imposed to the duties on the articles contracted to be delivered; and did not mean to include with them the additional duties imposed upon articles not contracted to be delivered, but actually used in the manufacture of the articles so contracted to be delivered. The section is an exception to the general rule of taxation established by the internal-revenue laws, and is substantially an exemption of persons in certain cases from taxation, and should be construed strictly.

Under this interpretation all persons who contracted before the passage of the act of June 30, 1864, to furnish clothing after its passage are treated alike by the United States, and are discharged from the payment of the two per cent. additional tax imposed by the act of June 30, 1864, upon clothing, but are not discharged from the payment of any additional taxes upon yarn or cloth. Such contractor might have man-

Claim of Farnham, Kirkham & Co.

factured and used, or purchased and received, such clothing, either before or after the passage of the act, and might or might not have been subjected to the payment of any additional taxes upon cloth, or to the payment of any equivalent amount, or of any higher price, in consequence of such additional taxes ; but into this Congress did not choose to inquire. Congress carefully chose its language, and by that language the certificate shall "be taken and received, so far as the same is applicable, in discharge of such subsequent duties on articles so contracted to be delivered to the United States, and actually delivered according to such contract."

I do not think that Boylan is entitled to receive back any of the taxes paid, either by himself or anybody else, upon the yarn or cloth out of which the clothing was made.

Very respectfully, your obedient servant,

E. R. HOAR.

Hon. GEORGE S. BOUTWELL,
Secretary of the Treasury.

CLAIM OF FARNHAM, KIRKHAM & CO.

The proviso to the 97th section of the internal-revenue act of June 30, 1864, is applicable only to such persons as, by reason of manufacturing the articles taxed either by themselves or their agents, would have been liable to pay the additional taxes upon the articles unless exempted therefrom by the provisions of that section.

ATTORNEY-GENERAL'S OFFICE,
September 13, 1869.

SIR: Your letter of the 30th of April last submits to me for an opinion the claim of Farnham, Kirkham & Co., to have paid to them out of the Treasury of the United States the amount of certain taxes on cloth imposed by the internal-revenue act of June 30, 1864.

Messrs. Jones Brothers & Co., and Mr. George W. Jones, on the 5th day of February and 1st day of June, 1864, entered into contracts with the United States "to have manufactured" for the United States, at a price named in the contracts, a certain quantity of dark-blue uniform cloth, portions

Claim of Farnhum, Kirkham & Co.

of which were, by the terms of the contracts, to be delivered to the United States after June 30, 1864, and were delivered accordingly. Jones Brothers & Co., and George W. Jones, did not themselves manufacture the cloth, but contracted with Farnhum, Kirkham & Co., who were the selling agents of Evans, Seagrave & Co., to have the cloth manufactured; and Evans, Seagrave & Co. manufactured it, and paid to the collector of internal revenue of their district the tax of five *per centum ad valorem* imposed upon cloth by the act of June 30, 1862. The tax upon cloth imposed by the previous acts was three *per centum ad valorem*. The amount of the additional taxes imposed by laws enacted subsequently to the date of the contracts, (being two *per centum ad valorem*,) was \$4,729.96. The precise nature of the contracts of Jones Brothers & Co., and of Jones with Farnhum, Kirkham & Co., is not stated; neither is it certainly known to me whether Farnhum, Kirkham & Co. entered into these contracts as principals or as agents of Evans, Seagrave & Co., although in one of the papers accompanying your letter it is said that they acted as agents; and it is stated that Evans, Seagrave & Co. drew on Farnhum, Kirkham & Co. for this sum of \$4,729.96, which Farnhum, Kirkham & Co. paid them, and this sum Farnhum, Kirkham & Co. now claim should be paid to themselves by the United States, either on their own account or on account of Jones Brothers & Co., and of George W. Jones, to whose rights, as against the United States, either in law or by the authority in fact of Jones Brothers & Co., and of George W. Jones, they regard themselves as subrogated.

In an opinion of the 6th instant, on the claim of James D. Boylan, I had occasion to consider whether the 97th section of the act of June 30, 1864, (13 Stat., 273,) was applicable to a claim to be paid back additional taxes imposed by the act, not upon the articles contracted to be delivered, but upon manufactures used in the production of such articles, and I came to the conclusion that it was not, but that the section was an exception to the general rule of the internal-revenue laws, that the taxes should be paid by the manufacturer, and was to be strictly construed. The present claim

Claim of Farnham, Kirkham & Co.

raises the question of the rights, under this section, of sub-contractors.

If Jones Brothers & Co., by themselves or their agents, manufactured this cloth, and were actually liable under the general provisions of the internal-revenue laws to pay to the United States the additional taxes imposed by the act of June 30, 1864, then a certificate made pursuant to the proviso of the 97th section would discharge them of this liability, and, if they had actually paid these additional taxes, then, on receiving such a certificate, it seems they would be entitled to have the amount so paid refunded, pursuant to regulations issued under the 44th section of the same act. But suppose Jones Brothers & Co., at the date of their contract, had the cloth on hand, having previously bought it of the manufacturer, then there would be no pretense for saying that they would be entitled to be paid by the United States a sum of money equivalent to *2 per cent.* of the value of the cloth, because the cloth had never been subject to any additional taxes by any law enacted subsequently to the date of the contract; and the liability to pay such additional taxes never existed on the part of any person.

Suppose, again, Jones Brothers & Co. purchased the cloth of the manufacturer after June 30, 1864, and without a previous contract with him. The manufacturer would be taxable *five per cent. ad valorem* upon the value of the cloth, under the act of June 30, 1864, and no part of this could he recover of Jones Brothers & Co. Jones Brothers & Co. may or may not have been compelled to pay a higher price by reason of the increased taxation, but they paid nothing, and were liable to pay nothing, as taxes on the cloth. The certificate could not discharge them of any liability to pay additional taxes, for no such liability on their part existed, and the liability of the original manufacturer to pay the taxes became fixed by the sale and delivery of the cloth to Jones Brothers & Co. After that, the amount of the taxes was a debt due by him to the United States, which neither by the common law nor by the language of the said 97th section would be discharged by the use subsequently made of the cloth by Jones Brothers & Co.

It is evident that Congress did not intend that, in every

Claim of Farnham, Kirkham & Co.

case where, between the date of the contract and the time of the delivery of the article, additional taxes were imposed by law upon the kind of articles contracted to be delivered, the amount of the additional taxes should be added to the stipulated price and paid by the United States, whether the additional taxes had actually been paid by anybody to the United States on the articles delivered or not. The reason of the enactment of the 97th section is supposed to be that the market value of articles is increased by imposing additional taxes upon the production of them ; and this is sometimes true. And when this takes place an increased value is given, as well to such articles already manufactured and on hand, as to those afterward manufactured. But the enactment of Congress is not of so wide an application as the reason on which it is supposed to rest. In the 69th section of the act of July 1, 1862, (12 Stat., 460,) it is enacted that the taxes on manufactures shall be paid by the manufacturer, with the proviso "that the taxes on all articles manufactured and sold in pursuance of contracts *bona fide* made before the passage of this act shall be paid by the purchasers thereof under regulations to be established by the Commissioner of Internal Revenue." Under this proviso it was never supposed that a purchaser of articles under a contract made before the passage of this act, of another purchaser, who, under a similar contract, purchased them of the manufacturer, was either liable to pay to the United States the taxes imposed by the act on the articles, or to pay an amount of money equivalent to the amount of such taxes, to the first purchaser who had paid the taxes to the United States. The taxes were collected of the first purchaser, and the law gave him no right of action to recover an equivalent amount of subsequent purchasers. (See opinion of Attorney-General Bates of April 27, 1860, 10 Opins., 476.)

In enacting the 97th section, with a knowledge of this opinion of the Attorney-General, and of the inconvenience of collecting the taxes of the purchasers of manufactured articles, Congress, in the cases that fall within it, seems to me to have done nothing more than to have made the manufacturer liable to pay the taxes to the United States, and to have given him a right of action to recover an equivalent amount

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of persons purchasing from him, and, when the United States are the purchasers, to have given him the right to be discharged from the payment of the additional taxes on exhibiting a proper certificate of the requisite facts. In transactions between individuals, the equivalent amount recovered of the purchaser by the manufacturer, this purchaser is not expressly authorized to recover of any person who purchases from him under a contract made prior to the passage of the act. This amount so to be recovered is not, as against the purchaser, a tax, and cannot be collected by distress as a tax can be, but is simply money due by an indebtedness, created by statute, from the purchaser to the manufacturer for taxes paid by the manufacturer for the benefit of the purchaser, and this indebtedness, I think, cannot be extended by construction so as to attach to a purchaser from the first purchaser.

This construction derives additional sanction from the language of the proviso. This proviso enacts that the certificate "shall be taken and received, so far as the same is applicable in discharge of such subsequent duties," but makes no provision for paying back duties already paid. If the articles were delivered by the manufacturer to the United States, the taxes on them would be assessable against the manufacturer on the list for the month when they were delivered, and the manufacturer would be required to make his returns thereof within the first ten days of the following month, and to pay the taxes on or before a day prescribed by the Commissioner, with the right of ten days' notice before proceedings to collect the taxes by distraining property could be instituted. The certificate of the proper officer of the Department by which the contract was made could be obtained at the time of the delivery of the articles, and the certificate could be delivered to the collector of internal revenue before the taxes were actually collected and in discharge thereof, so far as the same was applicable. As the taxes were not due until the articles were delivered, and as the articles were delivered to the United States under contracts made previously to the act imposing additional taxes, these additional taxes were never in fact due from the manufacturer to the United States,

Claim of Farnham, Kirkham & Co.

and the office of the certificate was to show that the manufacturer was exempt from the payment of them.

But, in cases where the articles were delivered by the manufacturer to an individual purchaser, the taxes became due from the manufacturer to the United States at the time of the delivery ; and, if Congress had intended that this liability should be discharged by the subsequent delivery of these articles by the purchaser to the United States under previous contracts, and thus the indebtedness of a third person to the United States be released, a somewhat more elaborate provision would have been necessary than that made in the proviso of the 97th section, as, in many cases, such taxes would already have been paid into the Treasury, and the facts on which the repayment must be made would not necessarily be within the official knowledge of the proper officer of the Department by which the contract was made. I think the proviso of the 97th section is applicable only to such persons as, by reason of manufacturing the articles either by themselves or their agents or servants, would have been liable to pay the additional taxes upon the articles, unless exempted therefrom by the provisions of the 97th section.

If Evans, Seagrave & Co. were the servants and agents of Jones Brothers & Co. in manufacturing this cloth, then Jones Brothers & Co. would be liable to pay the taxes upon it, unless they brought themselves within the provisions of the 97th section ; and, bringing themselves within its provisions, if they have paid these additional taxes by themselves or their agents or servants, I see no reason why the amount of them should not be paid back pursuant to regulations issued under the authority of the 44th section ; but if Evans, Seagrave & Co. furnished the materials for, and manufactured, the cloth at an agreed price per yard as contractors with Jones Brothers & Co., I do not think that these additional taxes can lawfully be paid back by the United States. The case of George W. Jones seems to be the same as that of Jones Brothers & Co.

Very respectfully, your obedient servant,

E. R. HOAR.

Hon. GEO. S. BOUTWELL,

Secretary of the Treasury.

Election of Senators in Virginia.

ELECTION OF SENATORS IN VIRGINIA.

The election of United States Senators by the legislature chosen under the new constitution of Virginia, is a part of the action contemplated by Congress as preliminary to the restoration of the State to its full relation to the Government of the United States as one of the States of the Union.

ATTORNEY-GENERAL'S OFFICE,
September 25, 1869.

SIR: I have the honor to acknowledge the receipt of your letter of this date, referring to me for my opinion a letter addressed to the Secretary of War by General Canby, dated September 24, 1869, which asks, whether the legislature of the State of Virginia is authorized to elect Senators of the United States at the session which commences on the 5th of next month, and desires that that question may be submitted to the Attorney-General for his opinion.

The general views which I entertain of the functions of the legislature of Virginia elected in pursuance of the provisions of the act of Congress of April 10, 1869, (16 Stat., 40,) have been already fully indicated in an opinion transmitted to the Secretary of War under date of August 28, 1869. I came to the conclusion that the members of the legislature were not required to take the oath referred to in section 9 of the statute of July 19, 1867, (15 Stat., 16,) in order to qualify them to act as such members; that it was competent under the law for the legislature to meet, organize, and do whatever was required or allowed by the acts of Congress as preliminary to the reconstruction of the State, but that it was not competent for them to undertake to enact laws, or otherwise to assume any of the functions of the government of the State, if organized without taking the oath above referred to, or if any of its members could not or did not take that oath.

Upon a careful consideration, I am now of opinion that the election of Senators, like voting upon the fourteenth and fifteenth amendments to the Constitution of the United States, is a part of the action contemplated by Congress as preliminary to a restoration of the State to its full relation to the Government of the United States, as one of the States of

Claim Agents—Suspension of.

the Union. The Senators thus elected would have no power or authority until the Senate of the United States should have passed upon the validity of their election, and admitted them as members of that body. Under the act of April 10, 1869, the election of members of the House of Representatives was permitted, and has taken place; and when Congress comes to act upon the whole question of the reconstruction of the State, it would seem equally proper that members elected to both branches of the national legislature should present themselves, and be ready for admission to seats in the respective houses. The election of Senators does not seem to me to transcend the action which comes within the limited and qualified purposes requisite to reconstruction, but rather to be essential to the completeness of that action; and I think that the military commander should not interfere with or prevent it.

The papers sent to me are herewith returned.

Very respectfully,

E. R. HOAR.

The PRESIDENT.

CLAIM-AGENTS—SUSPENSION OF.

It is competent to the head of a Department, as a measure for the protection of the public interests committed to his charge, to decline to recognize or to suspend the transaction of business with an agent or attorney for frauds and fraudulent practices attempted or committed by him in the prosecution of claims before the Department, and whose character is such that a reasonable degree of confidence cannot be placed in his integrity and honesty in dealing with the Government.

The authority to pursue this course, under those circumstances, rests upon the very necessity that exists for its adoption, as a safeguard against fraud, in administering the laws relating to the settlement and payment of claims upon the United States.

Besides, it is a just and necessary limitation upon the right of a party to be represented by an agent, and to select the agent by whom he will be represented, that he shall not employ a person offensive or dangerous to the other party with whom he is to deal.

The head of a Department, however, is not invested with any authority over the professional conduct of claim-agents, for the correction of mere private grievances, corresponding with that possessed by the courts of law over attorneys practicing therein.

Claim Agents—Suspension of.

Provisions of the 8th section of the act of March 2, 1861, conferring upon the Commissioner of Patents a similar power over the conduct of patent-agents, considered.

ATTORNEY-GENERAL'S OFFICE,

October 4, 1869.

SIR: I have had under examination the papers which accompanied your letter of the 16th ultimo, touching the matter of the suspension of certain claim-agents from practice in the War Department, under an order issued by your direction on the 11th of the same month.

This order appears to have been based upon information contained in an official report made by Brevet-Colonel R. J. Dodge, of June 12, 1869, to the Adjutant-General, which is found with the papers referred to me, wherein the parties named in the order are severally charged with directly or indirectly practicing fraud upon the United States and individuals, and with violating the rules of common honesty in the prosecution of bounty and pension claims of colored soldiers or their legal representatives.

The report of Colonel Dodge exhibits the result of an investigation that had been previously made by him at Memphis, Tennessee, under instructions from the Adjutant-General, and the charges against the said parties appear to be of a specific character, though the particular facts on which they rest are not set forth in the report. For the most part, however, they purport to be supported by sworn statements from claimants and others, which were taken by Colonel Dodge in the course of his investigation, and which are understood to be at present in the custody of the War Department.

The subject submitted for my consideration by your letter I understand to be, whether, on the information contained in that report, you are warranted in denying the said parties access to your Department as agents for the prosecution of claims; and, in connection with this, you observe, "I take it for granted this access is a privilege, not a right, and that, though harsh, a Secretary may withhold the privilege on testimony of a less degree than would be expected in case the party were indicted and prosecuted criminally." But doubts having been suggested in behalf of some of the parties concerned, as to the existence of the authority thus

Claim Agents—Suspension of.

asserted, it is deemed proper to take that subject under consideration also, as necessarily involved in the other.

I find that in an opinion dated October 8, 1866, Attorney-General Stanbery had occasion to consider the question, "Whether the Secretary of War has legal authority to exclude authorized attorneys and agents from collecting bounties, and whether the presentation of claims and payments are to be made by and to the claimants in person." This question appears to have arisen upon the "additional bounty" act of July 28, 1866, and the rules and regulations prescribed by the Secretary of War under the 15th section of that act, (14 Stat., 323.) The conclusion arrived at was, that the Secretary had "no legal authority to exclude authorized attorneys and agents from collecting bounties, and that in the presentation and payment of claims the claimant may act by attorney." This was put upon the ground that the act contained no provision either expressly or impliedly requiring the claim to be presented by the claimant in person; that whenever a right to be asserted or recovered does not from its very nature require the actual personal interposition of the party interested, the right of substitution necessarily prevails; that the denial of this right to claimants for bounties would lead to great inconvenience, and in many cases defeat the purposes of the act granting them; and that no intention on the part of the legislature to require every claimant to make claim in person, and collect the money in person, could be inferred from public policy, since Congress has, in various ways, recognized the intervention of claim-agents to be lawful; as by requiring them to take an oath of allegiance, (12 Stat., 610,) by making them the objects of special taxation, (14 Stat., 118,) and by regulating the fees and charges to be allowed for their services in certain cases, (12 Stat., 568; 13 Stat., 389; 14 Stat., 57, 368.)

That opinion goes to affirm the general right of claimants to transact their business with the Department through the medium of claim-agents, where not restrained by statute, together with the corresponding general right of these agents to prosecute before the Department the business which is intrusted to them by their principals. Of the correctness of this view there can be no doubt; and, as a general rule, the

Claim Agents—Suspension of.

Secretary of War cannot preclude the possessors of these rights from the enjoyment of them.

But the point now presented is, whether, notwithstanding all this, the Secretary may in his discretion decline to recognize an agent, or suspend the transaction of business with him, for "frauds and fraudulent practices" by such agent in the prosecution of claims before the Department.

In my judgment, it is entirely competent to the Secretary to adopt this course, under those circumstances, as a measure for the protection of the public interests committed to his charge. He is not bound to recognize or to do business with any claim-agent who is known to have perverted his vocation for the purposes of fraud, and whose character is such that a reasonable degree of confidence cannot be placed in his integrity and honesty in dealing with the Government. In the adjustment and payment of claims upon the United States, and especially of pension and bounty claims, where the forms and modes prescribed for establishing them are so liable to abuse, the responsibility of a public officer is necessarily very great, and he cannot, under the weight of this responsibility, fairly be expected to transact business with an agent whose past conduct throws a suspicion upon the genuineness of every document that comes through his hands, and in whose statements he can repose no reliance whatever. Under circumstances of this kind, he may, I think, very properly decline to expose the interests of the Government, as also of claimants, to the danger of becoming a prey to dishonest schemes and devices. Such, I am informed, has long been the practice of the Departments, and it is founded upon the very necessity that exists for its adoption in administering the laws relating to the settlement and payment of claims upon the Government, as a safeguard against fraud.

Furthermore, it seems to me to be a just and necessary limitation upon the right of a party to be represented by an agent, and to select the agent by whom he will be represented, that he shall not employ a person offensive or dangerous to the other party with whom he is to deal. Thus, he would have no right to send a thief, requiring special precautions to avoid the loss of property; nor a person whom the other party has reason to believe is seeking to defraud him. On

Claim Agents—Suspension of.

the other hand, an attempt by an agent to deceive or defraud his principal is, to any person having notice of the fact, a notice of the termination of the agency, and if the Government should afterward continue to deal with such an agent, it would become a party to the fraud.

The Secretary of War is not, however, invested with any authority over the professional conduct of claim-agents for the correction of mere private grievances, corresponding with that possessed by the courts of law over attorneys practicing therein. The relation between the latter is an official one, and from this is derived the summary jurisdiction which courts exercise over their attorneys. But as between the Departments and agents prosecuting claims before them, no official relation exists; and accordingly the Secretary can derive no such authority from that source, and none is conferred upon him by any statute that has come under my notice. I may observe that a power similar to this, over the conduct of patent-agents, has been given to the Commissioner of Patents by the 8th section of the act of March 2, 1861, (12 Stat., 247,) which provides that "for gross misconduct" he may "refuse to recognize any person as a patent-agent, either generally or in any particular case," subject to the approval of the President. But from the nature of the business transacted before the Commissioner, the misconduct of patent-agents cannot prejudice the pecuniary interests of the Government, but only the rights and interests of individuals; so that the provision just cited could have been passed for no other object than to enable that officer to refuse the recognition of such agents where the subject of complaint is in the nature of a private wrong, and where he might not be justified in so doing simply as a measure looking to the protection of the public interests against loss. For the latter purpose, certainly, no statutory authority was needed. .

I deem it unnecessary, in stating my views upon the other branch of the subject presented to me, to enumerate the various allegations contained in Colonel Dodge's report against the parties named in the before-mentioned order. They appear to be so numerous in a majority of the cases, and of so grave a character in all, that, coming as they do through the medium of an official report, made by an officer specially

Claim Agents—Suspension of.

assigned to the duty of investigating the subject-matter to which they relate, I cannot but regard them as abundantly sufficient to warrant the course pursued by you for the protection of the interests of the Government. But there is an obvious propriety in promptly furnishing the parties concerned with the charges resting against them, and allowing them an early opportunity to be heard in their own defense, unless, perhaps, it is contemplated immediately to make them the subject of judicial inquiry. This the ordinary principles of justice would seem to require.

While upon the subject, I may also add that where frauds have been committed or attempted to be committed upon the Government by agents, or through their aid and assistance, by means of fictitious claims and other devices, the statutes enacted for the punishment of such offenses ought to be enforced against them if practicable. So, also, where the provisions contained in the pension and bounty acts, designed for the protection of claimants against the cupidity and oppression of their agents, have been violated, the guilty parties ought to be brought to justice. It is not enough simply to withhold from them the opportunity to perpetrate further offenses; they should be made, if possible, to suffer the penalty imposed by law for their past misdeeds.

Since the reference of this matter here, a number of papers have been submitted by one of the aforesaid parties, by way of explanation of the charges against him; but I have not given them examination, inasmuch as I do not desire to pass upon the facts on which the charges are based. These papers are inclosed herewith in a package marked "A." I also inclose a paper containing a statement and argument, which has been submitted to me by counsel representing another of the parties. To the remarks and suggestions contained therein, I especially invite your attention. This paper is marked "B."

Presuming that the views which I have here the honor to communicate to you will be a sufficient answer to your request, I return the documents which accompanied your letter.

I am, sir, with great respect, your obedient servant,

E. R. HOAR.

Hon. WM. T. SHERMAN,

Secretary of War.

New Constitution of Mississippi.

NEW CONSTITUTION OF MISSISSIPPI.

A new apportionment for the election of members of the legislature of Mississippi, different from the apportionment provided in the constitution framed by the State convention and designed to be submitted to the people for adoption, cannot be made by the military commander there; nor can the article of that constitution, fixing the apportionment for members of the legislature, be separately submitted to the vote of the people.

ATTORNEY-GENERAL'S OFFICE,

October 5, 1869.

SIR: I have carefully considered the letter addressed to you by R. C. Powers, of Jackson, Mississippi, of the date of September 18, 1869, asking that a new apportionment may be made by the military commander in Mississippi for the election of members of the legislature under their new constitution, or that the article of the constitution which fixes the apportionment of members of the legislature may be submitted separately to the vote of the people of that State.

I can have no doubt that the alleged cause of complaint cannot be remedied by any action of yours. The people of Mississippi are to give their votes for or against the adoption of a constitution, and to elect members of the legislature under it. If the apportionment of representatives provided in the constitution submitted is unequal and unjust, they can reject the constitution for that reason; or, if it shall so appear to Congress, it may constitute a reason for the refusal by Congress to admit the State to representation under such a constitution. But the provision for the apportionment of representatives is an essential part of any constitution. If that provision were submitted separately and rejected, there would be no frame of government adopted for the State, the rest of the constitution not being sufficient to constitute a frame of government. And, on the other hand, if the constitution were adopted and a legislature elected, not according to the apportionment which the constitution provided, but under a different apportionment prescribed by the military commander, it is very clear that such a legislature would not be the legislature provided by the constitution, and would

Franking Privilege.

have no power to act under and in pursuance of that instrument.

The people of Mississippi must vote upon the constitution as it is ; and all essential parts of it they must accept or reject as one entire instrument. If any essential part seems to them so objectionable that they would be unwilling to adopt it as a whole, they can so decide ; but there is no warrant of law for submitting any other constitution than the one framed by the convention, or for electing a legislature on any other basis than that which it has marked out.

Very respectfully,

E. R. HOAR.

The PRESIDENT.

FRANKING PRIVILEGE.

The franking privilege is a personal privilege, and the selection of the person to whom matter shall be sent free through the mails cannot be delegated by the person enjoying the privilege to any other person.

ATTORNEY-GENERAL'S OFFICE,

October 21, 1869.

SIR : I have the honor to acknowledge the receipt of your letter of the 4th instant, in which you ask my opinion upon the question, whether a member of Congress has the right while in Washington to write his frank on copies of speeches made in Congress, and not by him addressed to any person, and to send them in bulk through the mail in one package under his frank to some person in Kentucky, to be by such person taken from the post-office in Kentucky, and separately addressed to other persons and remailed to other post-offices, under the frank originally put on.

If the persons to whom the speeches are separately sent are designated, not by the member of Congress, but by the person to whom the package was addressed, I think the speeches on being remailed are subject to the payment of postage. The speeches cannot be properly said to be sent by the member of Congress, if it is within the discretion of some

Importation of Neat Cattle.

other person to decide to whom they shall be sent, or whether they shall be sent at all. The franking privilege is a personal privilege, and the selection of the person to whom matter shall be sent free through the mails cannot be delegated by the person enjoying the privilege to any other person.

Very respectfully, your obedient servant,

E. R. HOAR.

Hon. J. A. J. CRESWELL,
Postmaster-General.

NOTE.—See note to opinion dated March 19, 1869, ante, p 3.

IMPORTATION OF NEAT CATTLE.

Under the provisions of the act of March 6, 1866, (14 Stat., 3,) it is for the Secretary of the Treasury to determine whether a cattle disease prevailing in a foreign country is such that, if neat cattle or the hides of neat-cattle are imported from thence into the United States, the importation will tend to the introduction or spread of contagious or infectious diseases among the cattle here.

Should the Secretary determine that such importation will have that tendency, he can revoke, in whole or in part, the suspension of the said act heretofore made by him.

ATTORNEY-GENERAL'S OFFICE,
October 22, 1869.

SIR: The letter of the Acting Secretary, of the 9th instant, submits to me, for an opinion, the question, "Whether the act of the 6th of March, 1866, (14 Stat., 3,) extends to the new contagious disease reported to the Department of State in consular dispatches Nos. 1000 and 1003 from our consul at Liverpool."

It appears that no proclamation has been issued by the President pursuant to the 2d section of the act, and the act is, therefore, in force. The 1st section of the act absolutely prohibits the importation of neat cattle and the hides of neat cattle, with a proviso that the Secretary of the Treasury may suspend the operation of the act, and may make all necessary orders and regulations to carry the act into effect, or to suspend its operation, whenever he shall officially determine and give public notice that such importation will not tend to

Importation of Neat Cattle.

the introduction or spread of contagious or infectious diseases among the cattle of the United States.

In pursuance of the authority granted by the 1st section, the Secretary of the Treasury, by a circular dated March 7, 1866, suspended the operation of the act in regard to importations from all other countries than those of Europe, with the requirement, however, that importations from such other countries should be accompanied by a certificate of a consul "that the cattle disease is not, and has not been recently, prevalent in the country from which the importation comes;" and from this requirement importations from Canada and the other British North American provinces were excepted.

By another circular, dated January 4, 1868, the Secretary of the Treasury suspended the prohibition of importations of neat cattle and the hides of neat cattle from the countries of Europe, with the same requirement in regard to a consular certificate that had been before made in regard to importations from other countries.

In my opinion, it is for the Secretary of the Treasury officially to determine whether the disease described in the consular dispatches is or is not such that, if neat cattle and the hides of neat cattle are imported into the United States from England, such importations will tend to the introduction or spread of contagious or infectious diseases among the cattle of the United States; and if he determines that such importations will tend to the introduction or spread of such diseases, he has the right to revoke, in whole or in part, the suspension of the operation of the act heretofore made by him. Such a revocation should be made, and public notice thereof given, in as formal a manner as is required for a suspension of the operation of the act.

Very respectfully, your obedient servant,

E. R. HOAR.

Hon. GEORGE S. BOUTWELL,

Secretary of the Treasury.

Duty of Attorney-General.

DUTY OF ATTORNEY-GENERAL.

Where the question proposed related to a matter pending before a court and might be raised there, and was not asked in reference to any action contemplated by the Department which submitted it, the Attorney-General requested to be excused from expressing an opinion thereon.

ATTORNEY-GENERAL'S OFFICE,

October 23, 1869.

SIR : I have received your letter of the 22d instant, with the accompanying papers, in which you ask my opinion upon the validity of the order of the President in pursuance of which certain property was sold to certain railroad companies in the State of Tennessee, in regard to which suits are now pending against these companies.

I understand that this question will be raised by the defendants, and can be determined by the court in these suits, and is not asked in reference to any action now contemplated by the Department of War. Under these circumstances, my opinion would have no effect upon the proceedings in court, and no relevancy to any matter now before the Department of War for decision ; and I therefore ask to be excused from expressing any opinion upon the question submitted, further than to say that I think the fact that this question has been raised in these suits should not prevent a vigorous prosecution of them, and the carrying before the Supreme Court of the United States of this and all other material questions of law, if decided against the United States by the courts in which the suits are now pending. Any other course would be opposed to the practice of this office, and might seem to the court before which the suits are pending, to be an attempt on the part of the Attorney-General to influence its action or opinion in a case before it. See Attorney-General Speed's opinion on an injunction against the naval commander at Mound City, (11 Opins., 407.)

Very respectfully, your obedient servant,

E. R. HOAR.

Hon. WILLIAM T. SHERMAN,
Secretary of War.

The President and the Judges—Tax on Salaries of.

THE PRESIDENT AND THE JUDGES—TAX ON SALARIES OF.

A tax upon the salary of an officer, to be deducted from what would otherwise be payable as such salary, is a diminution of his compensation; and, in the case of the President and the judges of the Supreme and inferior courts of the United States, such diminution would fall within the prohibition of the Constitution, if the act levying the tax was enacted during the official term of the President or of the judge affected thereby.

When Congress imposes a tax upon the salaries of all civil officers, the language, although general, must necessarily be construed to mean all civil officers except those whom Congress has not the constitutional power to subject to such a tax.

Accordingly, the just construction of the internal-revenue laws, taxing "all salaries of officers," &c., does not require or permit any deduction of an income-tax from the salaries of the President or the justices of the Supreme Court.

ATTORNEY-GENERAL'S OFFICE,
October 23, 1869.

SIR : Your letter of September 30, 1869, has been received, asking my opinion upon the question, "whether the law is constitutional which imposes a tax upon the salary of the President of the United States and upon the judges of the Supreme Court."

I find no law which in express terms imposes a tax upon the salary of either of those officers. But, as several of the statutes which provide for the assessment and collection of internal revenue contain provision for taxing the salaries of all civil officers of the United States, and thus include in their literal application the salaries of the President and of the judges of the Supreme Court of the United States, the question may perhaps be stated in this form : Are those statutes to be construed as authorizing the imposition of a tax upon the salaries of the officers in question ?

The first section of the second article of the Constitution of the United States contains this provision : "The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected." The first section of the third article contains the provision that

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"The judges both of the supreme and inferior courts shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office."

A specific tax by the United States upon the salary of an officer, to be deducted from the amount which otherwise would, by law, be payable as such salary, is, in my opinion, a diminution of the compensation to be paid to him, which, in the case of the President and the judges, would be prohibited by the Constitution of the United States, if the act of Congress levying the tax were passed during the official term of the President or of the judges respectively concerning whom the question should arise.

It was held in the case of *Dobbins vs. The Commissioners of Erie County*, (16 Pet., 435,) that the compensation of an officer of the United States, fixed by a law of Congress, was not subject to taxation under State authority, because the effect of such a tax would be to diminish the compensation which the officer was by law entitled to receive. Such a tax was held to interfere with the provision made by the United States for the due execution of the powers and functions of the National Government by means of officers which it appointed and paid. In the case of *The Pacific Insurance Company vs. Soule*, (7 Wall., 434,) it was decided that an income tax was an excise or duty imposed by a statute of the United States relating to internal revenue.

Congress, being prohibited by the Constitution from diminishing the salaries to be paid to the judges of the Supreme Court and the President during their respective terms of office, can no more do it by levying an excise or duty upon those salaries and deducting the amount thereof from them, than could a State from that of an officer of the United States under the doctrine of the case in 16 Peters' Reports. The tax directly operates as a diminution of the compensation of the officer.

I am, therefore, of opinion that no income tax could be lawfully assessed and collected upon the salaries of the President or any of the judges who were in office at the time the statute imposing the tax was passed. In regard to the salary of a subsequent President, or judges subsequently appointed,

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the constitutional objection would not arise, if it were clearly the intention of the legislature that the tax should be imposed upon these officers whenever, by new appointments or a new election, there would be no constitutional difficulty in the application of a previously existing law. But I am of opinion that this would not be the safe and just rule of construction. Statutes imposing taxes are in their nature temporary, and subject to frequent modification and repeal. When Congress imposes a tax upon the salaries of all civil officers, the language, although general, must necessarily be construed to mean all civil officers except those whom Congress has not the constitutional power to subject to such a tax.

As the language of the statute could have no application to the President and judges holding their offices at the time it was passed, there would seem to be sufficient reason for holding that there was no intention that it should apply to those officers. If it were supposed applicable to the salary of the President, the singular result would follow in his case, that, as the Constitution prohibits the increase as well as the diminution of his salary during his term of office, if at the time when his official term commenced, his salary was subject to a deduction in the nature of a tax, it would not be competent for Congress during his term of office, by any repeal or diminution of the tax, to increase the amount paid to him. So that if the law imposing an income tax were repealed, the President alone, of all the citizens of the country, would continue liable for its payment during the term for which it had been originally imposed, if his official term so long continued. And, in the case of the judges, as the amount of income tax laid upon salary should be varied from time to time, one judge might be liable only to the amount of part of the income tax which the law imposed on salaries generally, and different members of the same court would be receiving different rates of compensation.

I think it a more reasonable view that the class of officers over which Congress has not this taxing power by the Constitution should not be held to be embraced within the general phrase, "all salaries of civil officers," and have therefore come to the conclusion that the just construction of the

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law does not require or permit any deduction of an income tax from the salaries of the President or the justices of the Supreme Court.

Very respectfully, your obedient servant,

E. R. HOAR.

Hon. GEO. S. BOUTWELL,
Secretary of the Treasury.

REFERRING CASES TO COURT OF CLAIMS.

Where a claim against the United States for the value of property lost in the military service, filed under the provisions of the act of March 3 1849, had been adjusted by the accounting officers of the Treasury, and the amount found due the claimant certified to the Secretary of War for the issue of a requisition for payment: *Held* that it was competent to the Secretary of War, if it should appear that this claim belonged to the class described in the 7th section of the act of June 25, 1868, to withhold his requisition and cause the claim to be transmitted to the Court of Claims for adjudication, notwithstanding the amount found due thereon had been certified to him as aforesaid.

Provisions of the acts of March 30, 1868, and June 25, 1868, compared.
It should distinctly appear on the records or in the proceedings of a Department, when a claim is thus caused to be transmitted to the Court of Claims by the head of that Department, that disputed facts or controverted questions of law are involved in it, and that either the amount in controversy exceeds \$3,000, or (without regard to the amount involved in the particular case) that the decision will affect a class of cases, or furnish a precedent for the future action of the Department in the adjustment of a class of cases, or that an authority, right, privilege, or exemption is claimed or denied under the Constitution; and, furthermore, what the facts disputed or questions of law controverted are.

The head of a Department should also transmit to the court such a certificate as will show that the claim is one "of the character, amount, or class limited" in the said 7th section, that it may appear upon the face of the papers transmitted that the court has jurisdiction of the case.

ATTORNEY-GENERAL'S OFFICE,
October 29, 1869.

SIR: I have the honor to acknowledge the receipt of your letter of the 18th of June last, in which you transmit the papers relating to the claim of Herman Kountze, of Omaha, Nebraska.

It appears from the papers that Kountze filed with the

Referring Cases to Court of Claims.

Third Auditor a claim against the United States under the provisions of the 2d section of the act of March 3, 1849, (9 Stat., 415,) to be paid the value of a number of mules alleged to have been captured by the Indians while employed in the military service of the United States under a contract made by him with the Quartermaster's Department of the Army. These papers the Auditor referred to the Quartermaster-General for examination and report, and the Quartermaster-General returned them with a recommendation that the claim be disallowed. The claim, however, was subsequently allowed by the Auditor, and by him sent to the Second Comptroller; and by the Second Comptroller the sum of nineteen thousand and eight hundred dollars (\$19,800) was found due the claimant, which the Second Comptroller certified to the Secretary of War in the usual form, in order that the Secretary of War might make a requisition upon the Secretary of the Treasury for its payment.

In your letter you refer to the 7th section of the act of June 25, 1868, (15 Stat., 76,) and ask "whether under this section you may lawfully decline to sign the requisition for the amount found due the claimant by the accounting officers, and may transmit the papers to the Court of Claims, in order that the merits of the case may be there decided." The 3d section of the act of March 3, 1849, (9 Stat., 415,) provides "that the claims provided for under this act shall be adjusted by the Third Auditor, under such rules as shall be prescribed by the Secretary of War, under the direction or with the assent of the President of the United States, as well in regard to the receipt of applications of claimants as the species and degree of evidence, the manner in which such evidence shall be taken and authenticated, which rules shall be such as, in the opinion of the President, shall be best calculated to obtain the object of this act, paying a due regard as well to the claims of individuals' justice as to the interest of the United States;" and the rules prescribed by the Secretary of War in pursuance of this section (see General Orders No. 113, May 2, 1863,) require that all claims under the provisions of this act be presented to the Third Auditor of the Treasury. The 8th section of the act of July 28, 1866 (14 Stat., 327) provides "that the said Auditor shall, in all cases, transmit

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his adjustment, with all the papers relating thereto, to the Second Comptroller for his revision and decision thereon, the same in all respects as is provided in the act of the 2d September, *eighteen* [seventeen] hundred and eighty-nine;" and by the 5th section of the last-named act, (1 Stat., 66,) the Auditor was required to certify the balance, and transmit the accounts, with the vouchers and certificates, to the Comptroller for his decision thereon.

By the 9th section of the act of March 3, 1817, (3 Stat., 367,) it is made "the duty of the Second Comptroller to examine all accounts settled by the Second, Third, and Fourth Auditors, and certify the balances arising thereon to the Secretary of the Department in which the expenditure has been incurred;" and by the 5th section of the same act it is made "the duty of the Auditors * * * * to receive from the Second Comptroller the accounts which shall have been finally adjusted, and to present such accounts with their vouchers and certificates."

In compliance with these provisions of law and the regulations prescribed thereunder, Mr. Kountze filed his claim and proofs with the Third Auditor. The Third Auditor, for information, sent it to the Quartermaster-General. On its return from the Quartermaster-General, the Third Auditor examined and allowed it to the amount of nineteen thousand and eight hundred dollars, and transmitted all the papers relating thereto to the Second Comptroller for his revision and decision. The Second Comptroller decided that this sum was due the claimant, and certified to the Secretary of War that he had found this sum due, and he then sent back to the Third Auditor the account with the vouchers.

The claim is for property captured while in the military service of the United States by contract, and, if paid at all, is to be paid upon a requisition issued by the Secretary of War; it was filed by the Third Auditor pursuant to the rules prescribed by the Secretary of War, under the direction of the President, and is, therefore, a claim made upon the Department of War within the meaning of the 7th section of the act of June 25, 1868. It is also a claim founded upon a law of Congress, viz., the 2d section of the act of March 3, 1849, and therefore is such as the Court of Claims might, under

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existing laws, take jurisdiction of on the petition of the claimant. See the 1st section of the act of February 24, 1855, (10 Stat., 612,) and also *Lieutenant Powell's Case*, (1 Nott and Huntington, 400.) It is understood that the facts do not bring this claim within the meaning of the 1st section of the act of July 4, 1864, (13 Stat., 381.)

Before the passage of the act of March 30, 1868, (15 Stat., 54,) it was the prevailing opinion of the Attorneys-General that the head of an Executive Department had the right to refuse to sign a requisition for a warrant for the payment of a claim found due by the accounting officers, if he saw fit to do so. See opinion of Attorney-General Stanbery under date of September 15, 1866, (12 Opins., 43,) and the opinion of Attorney-General Bates in the case of Anson Dart, (10 Opins., 231, 237.)

The act of March 30, 1868, (15 Stat., 54,) was passed that the revision of balances certified to heads of Departments by the Commissioner of Customs or the Comptroller of the Treasury should only be made by Congress or the proper courts, and that such balances so certified should be final and conclusive upon the executive branch of the Government, with the proviso "that the head of the proper Department, before signing a warrant for any balance certified to him by a Comptroller, may submit to such Comptroller any facts in his judgment affecting the correctness of such balance; but the decision of the Comptroller thereon shall be final and conclusive, as hereinbefore provided."

Under this act, if the head of a Department doubted the correctness of the balance certified to him by the Comptroller, he had the right to submit to the Comptroller any facts in his judgment affecting the correctness of the balance; but the decision of the Comptroller, after such facts were submitted to him, was final and conclusive on the head of the Department, and he had, thereafter, no right to withhold his requisition, unless the claim came within the provisions of the 7th section of the act of June 25, 1868, (see opinion of March 25, 1869.) That section authorizes the head of any Executive Department, whenever any claim is made upon his Department, in certain cases, to cause such claim, with all the vouchers, papers, proofs, and documents pertaining thereto,

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to be transmitted to the Court of Claims, to be there proceeded in as if originally commenced by the voluntary action of the claimant; "and the Secretary of the Treasury may, upon the certificate of any Auditor or Comptroller of the Treasury, direct any account, matter, or claim, of the character, amount, or class described or limited in this section, to be transmitted with all the vouchers, papers, documents, and proofs pertaining thereto, to the said Court of Claims, for trial and adjudication;" and in the proviso it is enacted that "all the cases mentioned in this section which shall be transmitted by the head of any Executive Department, or upon the certificate of any Auditor or Comptroller, shall be proceed in as other cases pending in said court."

The special authority granted by this section to the Secretary of the Treasury would seem to be for the purpose of enabling him, upon the certificate of an Auditor or Comptroller that the claim is of the character, amount, or class described in the section, and one that, in the opinion of the Auditor or Comptroller, should be transferred to the Court of Claims, so to transfer it; while under the first clause of the section the head of any Executive Department, without regard to the opinion of the Auditor or Comptroller, may cause any claim of the character, amount, or class described in the section to be transmitted to that court.

It should distinctly appear on the records, or in the proceedings, of a Department, when a claim is thus caused to be transmitted to the Court of Claims by the head of that Department, that disputed facts or controverted questions of law are involved in it, and that either the amount in controversy exceeds three thousand dollars, or that the decision will affect a class of cases, or furnish a precedent for the future action of the Department in the adjustment of a class of cases without regard to the amount involved in the particular case, or that an authority, right, privilege, or exemption is claimed or denied under the Constitution of the United States; and I think it should also appear on the records or in the proceedings of the Department what the facts disputed, or questions of law controverted, are; and if the Second Comptroller shall not have found the facts and expressed his opinion upon the questions of law involved in the claim, at

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the time he decided upon the balance due which he certified to the Department, I think it is competent to the head of the Department, under the proviso of the act of March 30, 1868, to submit to the Comptroller any facts in his judgment affecting the correctness of the balance found due, and to ask the Comptroller whether he finds such to be the facts, and what his rulings are upon the questions of law applicable to them in their relations to the claim; and on the return to the head of the Department by the Comptroller of his decision after the facts thus submitted, it may then be determined what the facts disputed, or the questions of law controverted, are, and a record or certificate thereof made in the Department before the cause is transmitted to the Court of Claims.

If it shall appear that this claim is of the class described in the first clause of the 7th section of the act of June 25, 1868, I think it is within the lawful power of the Secretary of War to cause it to be transmitted, with all the vouchers, papers, proofs, and documents pertaining thereto, to the Court of Claims for adjudication, even after the balance found due by the Comptroller has been certified to him. It is for the Secretary of War alone to determine whether it is his duty to exercise this power in this case; but if the claim is to be transmitted to the Court of Claims, such a certificate by the Secretary of War as will show that the claim is one "of the character, amount, or class described or limited in this section," should also be transmitted to the court, that it may appear on the face of the papers transmitted that the court has jurisdiction to hear and determine the case.

Very respectfully, your obedient servant,

E. R. HOAR.

General Wm. T. SHERMAN,
Secretary of War.

COMPENSATION OF NAVAL PAYMasters IN CALIFORNIA.

After the passage of the act of June 1, 1860, a purser in the Navy, on duty *in a receiving-ship* at the naval station in California, could only receive the compensation authorized by that act.

Under the laws previously in force, by which the pay of a purser on duty at the *naval station* or *navy-yard* at California must be determined,

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but one purser could lawfully be attached to that station on general or special duty, or do duty at that navy-yard, so as to be entitled to the pay fixed by those laws for that service, unless he were a purser of the Navy appointed inspector of provisions, clothing, and small-stores at that yard; and a purser doing duty in a receiving-ship stationed at or near a navy-yard or station, was not to be regarded as a person on duty at or attached to that navy-yard or station.

Review of the various statutes relating to the subject.

ATTORNEY-GENERAL'S OFFICE,
November 3, 1869.

SIR: Your letter of July 12, 1869, asks my opinion upon the question, whether more than one paymaster can, at the same time, be allowed the pay provided by the law of March 3, 1853, (10 Stat., 220,) for a purser, when attached to, and doing duty at, the naval station in California.

The question is asked for the purpose of determining the amount of pay to which Paymaster Schenck, of the Navy, is entitled, while doing duty as paymaster of the receiving-ship at the navy-yard near San Francisco, California. Your letter states that the Department of the Navy considers Paymaster Schenck as attached to, and doing duty at, the California station, and that it is necessary to employ more than one paymaster on that station; but that hitherto only one of them has been allowed the special rate of pay provided by the statute named.

It is necessary to consider the meaning and application of the following statutes: The 3d section of the act of August 26, 1842, (5 Stat., 535;) the 8th section of the act of March 3, 1845, (5 Stat., 795;) the 4th section of the act of March 3, 1849, (9 Stat., 378;) the 1st section of the act of March 3, 1853, (10 Stat., 220;) the 1st section of the act of March 3, 1855, (10 Stat., 676;) and the act of June 1, 1860, (12 Stat., 23.)

The naval station in California is first called a *navy-yard* in the Navy Register of the year 1855, this change of name having been made in consequence of the purchase of land and the construction of works pursuant to the act of September 28, 1850, (9 Stat., 516;) the act of August 31, 1852, (10 Stat., 105;) the act of March 3, 1853, (10 Stat., 223;) act of March 3, 1855, (10 Stat., 678,) and subsequent acts; but

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this change of name is immaterial. By the 3d section of the act of June 22, 1860, (12 Stat., 83,) pursers in the Navy are thereafter to be styled paymasters. By the act of August 26, 1842, express provision is made for the annual pay of pursers attached to vessels in commission for sea-service, on duty at navy-yards, at naval stations, in receiving-ships at Boston, New York, and Norfolk, and at other places, and on leave, or waiting orders; and all the navy-yards then established are named in the act; and a distinction is made between pursers on duty at navy-yards and in receiving-ships, although those ships may be stationed at navy-yards. At the date of the passage of this act, California was not a part of the territory of the United States. The 8th section of the act of March 3, 1845, provides that "no more than one purser doing duty at any navy-yard shall, at the same time, be entitled to the pay fixed by law for that service." When a naval station was established in California, a purser on duty at it, until the passage of the law of March 3, 1849, was entitled to receive \$1,500 a year, under the act of August 26, 1842. After the passage of the act of March 3, 1849, he was entitled to receive the same pay as if attached to a frigate in commission for sea service, namely, \$3,000, with the special provision that "not more than one purser shall at the same time be attached to the same station on general or special duty." This continued until the passage of the law of March 3, 1853, by which the pay of a purser, when attached to, and doing duty at, the naval station at California, was made \$4,000 per annum; and by the proviso in the 1st section of the act of March 3, 1855, when pursers of the Navy shall be appointed inspectors of provisions, clothing, and small-stores, they shall, while so acting, receive the same compensation as the pursers of the navy-yard to which they may be attached.

These were the acts in force before the passage of the act of June 1, 1860, and by them pursers when on duty in receiving ships at Boston, New York, and Norfolk were to be paid at the rate of two thousand five hundred dollars per annum; at other places, one thousand five hundred dollars per annum; when on duty at the naval station in California, four thousand dollars per annum; at other stations within the United

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States, one thousand five hundred dollars per annum; at navy-yards at Boston, New York, Norfolk, Pensacola, and Washington, two thousand five hundred dollars per annum; and at Portsmouth and Philadelphia, two thousand dollars per annum, with the general provision "that no more than one purser doing duty at any navy-yard shall at the same time be entitled to the pay fixed by law for that purpose," and the further general provision that "when pursers of the Navy shall be appointed inspectors of provisions, clothing, and small stores, they shall, while so acting, receive the same compensation as the purser of the navy-yard to which they may be attached," and with the special provision that "not more than one purser shall, at the same time, be attached to" the naval station of California "on general or special duty."

By these acts it is plain that a purser on duty in a receiving-ship, whether stationed at a navy-yard or a naval station, was not regarded as on duty at, or attached to, that navy-yard or naval station, distinct provisions having been made for these two kinds of service. The act of June 1, 1860, established, on entirely new principles, the pay of pursers as well as other officers of the Navy, and the question was submitted to the Attorney-General whether that act was of universal application in respect to the pay of pursers in the Navy; or whether, after its passage, the pay of a purser attached to the naval station or yard in California was to be determined by the special provisions of law relating to that station or yard, and in force at the date of the passage of that act. Mr. Browning, the Attorney-General *ad interim*, in an opinion dated June 15, 1868, decided that the pay of a purser on duty at the navy-yard in California from the 11th of April, 1861, to the 29th of June, 1864, was not to be determined by the act of June 1, 1860, but by the previous acts hereinbefore cited, on the ground that the act of June 1, 1860, did not expressly repeal any of the preceding acts, and the special provisions in preceding acts relating to the pay of the purser at the naval station in California were not, by necessary implication, repealed by the act of June 1, 1860; and he accordingly held that the paymaster on duty at the navy-yard in California was entitled to be paid at the rate of four thousand dollars per annum.

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Without considering whether, if the question were a new one I should concur in the opinion of Mr. Browning, it seems obvious that, if that opinion be taken to be correct, the laws in force prior to the passage of the act of June 1, 1860, must determine the pay of the purser on duty at the naval station or navy-yard at California, and that by those laws only one purser can lawfully be attached to that station on general or special duty, or do duty at that navy-yard so as to be entitled to the pay fixed by those laws for that service, unless he be a purser of the Navy appointed inspector of provisions, clothing, and small stores at that yard, and that the purser doing duty in a receiving ship stationed at or near a navy-yard or station is not to be regarded as a purser on duty at, or attached to, that navy-yard or station. If the act of June 1, 1860, does not impliedly repeal the previous acts in regard to the amount of the pay of the purser attached to, or doing duty at, the naval station in California, it does not repeal those acts in regard to the conditions under which a purser becomes entitled to this pay, or the number of persons that can at the same time receive it.

In accordance, however, with this opinion of Mr. Browning, a purser on duty in a receiving ship in California, inasmuch as his pay was not determined by the special provisions of law relating to the station in California, would, after the passage of the act of June 1, 1860, be entitled to receive the pay given by that act. If the correctness of Mr. Browning's opinion be denied, and it be held that the act of June 1, 1860, is the only law in force fixing the pay of pursers in the Navy, whether attached to the naval station in California or elsewhere, it also follows that a purser on duty in a receiving ship stationed at that yard can receive only the pay authorized by that act.

Very respectfully, your obedient servant,

E. R. HOAR.

Hon. GEORGE M. ROBESON,

Secretary of the Navy.

Extension of Contracts.

EXTENSION OF CONTRACTS.

In August, 1864, the Postmaster-General, after previous advertisement for proposals, made a contract with one N. for furnishing the Government with stamped envelopes and newspaper wrappers, the term of which extended from September 12 to December 31, 1864; the advertisement did not provide for any extension of the contract beyond that term, but the contract contained a provision that it might be extended or modified by mutual agreement; the contract was subsequently modified and extended to April 1, 1866, again to April 1, 1867, again to April 1, 1868, and finally to April 1, 1871: *Held*, 1st, that section 17 of the act of August 26, 1842, (chap. 202,) applied to the contract; 2d, that the provision in the contract for its extension was unauthorized by law; and 3d, that the Postmaster-General may terminate the contract, on reasonable notice to the contractor, without reference to any failure on the part of the latter to perform it.

Any extension of such a contract, unless for a period fixed as an alternative in the proposals, is unwarranted.

The provisions of the acts of 1851, (chap. 20, sec. 3,) and 1852, (chap. 113, sec. 88,) imposing certain duties on the Postmaster-General relative to furnishing stamped envelopes, do not interfere with the general provision contained in the act of 1842, regulating the manner in which he shall provide such articles, viz., by advertisement for proposals, and contract made in pursuance thereof.

ATTORNEY-GENERAL'S OFFICE,

December 4, 1869.

SIR: I have the honor to acknowledge the receipt of your letter of the 24th of November, 1869, in which you desire my opinion in answer to several questions relating to a contract entered into between the Post-Office Department and George F. Nesbitt, dated August 2, 1864, originally made to extend from September 12, 1864, to December 31, 1864, and subsequently extended from time to time with modifications. I have given the several questions careful consideration, and now send you my reply.

It appears by the papers which you submit, including a copy of the contract, that the contract was made with Mr. Nesbitt by Postmaster-General Blair, after advertisement such as was required for stationery and blanks furnished post-offices under the provisions of the statute of 1842, ch. 202, sec. 17. The advertisement contained no provision for extending the contract beyond the term for which proposals

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were invited; but the articles of agreement contained the following provision: "And it is further agreed by both the parties hereunto that the terms and provisions of this contract may be modified or extended beyond the aforesaid thirty-first day of December, eighteen hundred and sixty-four, provided such continuance shall be mutually agreed upon by the contracting parties."

The first modified agreement extending the contract was signed by Postmaster-General Dennison on the 16th of March, 1865, extending the contract as thus modified from April 1, 1865, to April 1, 1866, and contained a similar provision for again modifying and extending it.

The second modified agreement extended the contract from April 1, 1866, to April 1, 1867. By an order signed by Postmaster General Randall on the 14th of December, 1866, the contract was extended from April 1, 1867, to April 1, 1868. On the 25th of September, 1866, the proposition to reduce the price of drop-letter envelopes, made by the contractor, was accepted by the Postmaster General; and, finally, on the 9th of September, 1867, an order of Postmaster-General Randall was made modifying the order of December 14, 1866, so as to make the term of extension four years from the 1st day of April, 1867, upon certain new conditions, which were assented to by the contractor, who gave bond for the execution of the contract as thus modified and extended.

Your first question is, whether the "contract for making and furnishing stamped envelopes and newspaper-wrappers comes within the purview of the act of 26th August, 1842, sec. 17, (5 Stat., 526,) which requires that all stationery and job printing, of every name and nature, shall be furnished and performed by contract by the lowest bidder;" and if so, whether there can be an extension of such a contract without a new advertisement?

I am of the opinion that the provisions of that statute apply to the contract in question, and that, although the contract contained a provision for its extension and modification at the pleasure of the contracting parties, such a provision was not authorized by law. If a contract, which the law only allows to be made in pursuance of an advertisement, could afterward be renewed and extended at the pleasure of

Extension of Contracts.

the Postmaster-General without any advertisement, it would be in the power of that officer and his successors in office, unless restrained by some subsequent act of the legislature, to make for all future time such contracts as he might think expedient, without reference to the conditions contained in the original advertisement for proposals, or to the terms upon which the contract was offered to public competition.

You further question, whether, if the contract provides an extension by agreement, there can be more than one extension without advertisement, must of course be answered in the negative, as I do not regard any extension, unless for a period fixed as an alternative in the proposals, as authorized or sanctioned by law.

Your second question, based upon a possibly different reply to the first, refers to the statute of 1851, ch. 20, sec. 3, and to the statute of 1852, ch. 113, sec. 8, making it the duty of the Postmaster-General to provide and furnish to deputy postmasters and others suitable postage stamps and stamped envelopes. Although the question does not require an answer for the reason just stated, yet I deem it proper to say that I do not regard the direction to the Postmaster-General to provide and furnish stamps and stamped envelopes as interfering at all with the general and important provision of law contained in the statute of 1842, regulating the manner in which he shall make a provision of all such articles, namely, by an advertisement for proposals, and a contract executed in pursuance thereof.

Your third question is this: "Is the extension of said contract, made or attempted to be made by Postmaster-General Randall for four years, terminating April 1, 1871, binding on the Department until the expiration of the said term of four years; or, in other words, has the Postmaster-General power to terminate the same on reasonable notice, in his discretion, or is he bound to base such termination upon a violation by the contractor of some of the covenants of said contract?"

The answer follows obviously, as the result of the opinion already expressed, and illustrates the importance of adhering to the salutary provisions of law requiring contracts to be made upon advertisement. If a Postmaster-General can extend a contract in this manner for four years, without op-

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portunity for any one to compete for the supply of an article of such large consumption, I know no limit to his power in that respect. If it be a valid contract binding upon the Government, although extending beyond his own term of office, it binds his successors, and cuts off for the term for which he chooses to fix the contract, all advantage to the Government of any changes in the market by which a saving could be effected. If he may do it for four years, I can see no legal reason why he may not for ten, fifty, or a hundred years. A contract made under such circumstances seems to me an extraordinary one, and I think that you have a right to terminate it on reasonable notice to the contractor, without reference to any failure on his part to perform it.

Very respectfully,

E. R. HOAR.

Hon. J. A. J. CRESWELL,
Postmaster-General.

NEUTRALITY ACT.

Judicial proceedings should not be instituted by the United States, under the 3d section of the act of April 20, 1818, (3 Stat., 448,) against certain gun-boats building in New York for the Spanish government, and which, there is reason to believe, are to be employed by that government against Cuba.

The provisions of that section examined, and shown to be inapplicable, in view of all the circumstances, to the case under consideration.

ATTORNEY-GENERAL'S OFFICE,

December 16, 1869.

SIR: In compliance with your oral request, I send you in writing my opinion upon the question, whether it is proper for the United States to cause a libel to be filed under the 3d section of the statute of April 20, 1818, entitled "An act in addition to 'An act for the punishment of certain crimes against the United States,' and to repeal the acts therein mentioned," against the gun-boats building in New York for the Spanish government, on the ground that they are pro-

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cured to be fitted out and armed with intent that they shall be employed in the service of Spain, a foreign state, with intent to cruise or commit hostilities against the subjects, citizens, or property of a "colony, district, or people" with whom the United States are at peace, namely, a "colony district, or people" claiming to be the *Republic of Cuba*.

The statute of 1818 is sometimes spoken of as the *Neutrality Act*; and undoubtedly its principal object is to secure the performance of the duty of the United States, under the law of nations, as a neutral nation in respect to foreign powers. But it is an act to punish certain offenses against the United States by fines, imprisonment, and forfeitures, and the act itself defines the precise nature of those offenses. The United States have not recognized the independent national existence of the island of Cuba, or any part thereof, and no sufficient reason has yet been shown to justify such a recognition. In the view of the Government of the United States, as a matter of fact, which must govern our conduct as a nation, the island of Cuba is a territory under the government of Spain, and belonging to that nation.

If ever the time shall come when it shall seem fitting to the political department of the Government of the United States to recognize Cuba as an independent government, entitled to admission into the family of nations, or, without recognizing its independence, to find that an organized government capable of carrying on war, and to be held responsible to other nations for the manner in which it carries it on, exists in that island, it will be the duty of that department to declare and act upon those facts. But before such a state of things is found to exist, it is not, in my judgment, competent for a court to undertake to settle those questions. The judicial tribunals must follow and conform to the political action of the Government in regard to the existence of foreign states, and our relations to them; and it would, in my opinion, be inconsistent with the honor and dignity of the United States to submit to a court, and allow to be declared and acted upon, in such an indirect manner, rights and duties toward a foreign nation which the Government is not prepared distinctly and upon its own responsibility to avow and maintain.

It has been brought to my notice, as to yours, by persons

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who profess to represent the Cuban insurgents, that libels have already been filed in the courts of the United States, under the statute of 1818, to procure the condemnation of vessels on the ground that they were being fitted out and armed with intent to be employed in the service of a "colony, district, or people," namely, the "colony, district, or people" of Cuba, with intent to cruise and commit hostilities against the subjects of Spain, a nation with whom we are at peace; and it is argued that this involves what is claimed to be the converse of the proposition, that, as we assert in those libels that Cuba is a "colony, district, or people," capable of committing hostilities against Spain, the law equally applies to an armament procured or fitted out by Spain for the purpose of hostilities against Cuba, and that the Executive Government, by filing those libels, have virtually recognized the "colony, district, or people" of Cuba as belligerents.

This argument seems to me to involve an erroneous legal notion, and to be based upon the idea that the statute of 1818, being an act to protect and enforce the neutrality of the United States, cannot be applied except where there are independent parties to a contest entitled to equal rights. But this, I think, is an opinion wholly unsound. Undoubtedly the ordinary application of the statute is to cases where the United States intends to maintain its neutrality in wars between two other nations, or where both parties to a contest have been recognized as belligerents, that is, as having a sufficiently organized political existence to enable them to carry on war. But the statute is not confined in its terms, nor, as it seems to me, in its scope and proper effect, to such cases. Under it, any persons who are insurgents or engaged in what would be regarded under our law as levying war against the sovereign power of the nation, though few in number and occupying however small a territory, might procure the fitting out and arming of vessels with intent to cruise or commit hostilities against a nation with which we were at peace, and with intent that they should be employed in the service of a "colony, district, or people" not waging a recognized war. The statute would apply to the case of an armament prepared in anticipation of an insurrection or re-

Neutrality Act.

volt in some district or colony which it was intended to excite, and before any hostilities existed.

But, on the other hand, when a nation with which we are at peace, or the recognized government thereof, undertakes to procure armed vessels for the purpose of enforcing its own recognized authority within its own dominions, although there may be evidence satisfactory to show that they will aid the government in the suppression of insurrection or rebellion, in a legal view this does not involve a design to commit hostilities against anybody. If the illicit distillers of any section of the United States combine together to resist by force the collection of the revenue, and arm themselves for this purpose with the intent to set at defiance permanently and by force the laws of the United States, they may be levying war against the Government; but when the Government sends its officers to disperse or arrest the offenders, although it may find it necessary to employ military force in aid of its authority, it certainly cannot be considered as committing hostilities against the territory over which such operations extend.

The question of belligerency between organized communities is a question of fact, and may be one of the gravest facts upon which a nation is called to decide and act. The concession of belligerent rights to a "colony, district, or people" in a state of insurrection or revolution, necessarily involves serious restrictions upon the ordinary rights of the people of this country to carry on branches of manufacture and trade which are unrestricted in time of peace. To prevent our mechanics and merchants from building ships of war and selling them in the markets of the world, is an interference with their private rights which can only be justified on the ground of a paramount duty in our international relations; and however much we may sympathize with the efforts of any portion of the people of another country to resist what they consider oppression or to achieve independence, our duties are necessarily dependent upon the actual progress which they have made in reaching these objects.

This subject, as you are well aware, is one to which long and careful consideration has been applied, and the result which I have thus briefly stated, and which might receive

Re-appropriation of Moneys Carried to Surplus Fund.

much fuller statement and illustration, is that upon which the administration have acted. I trust that I have made my view of the law intelligible, and have the honor to be,

Very respectfully,

E. R. HOAR.

Hon. HAMILTON FISH,
Secretary of State.

RE-APPROPRIATION OF MONEYS CARRIED TO SURPLUS FUND.

The act of March 3, 1869, providing "for the completion of a custom-house, &c., at Knoxville, East Tennessee, *in addition to former appropriations, \$5,000,*" does not re-appropriate any of the unexpended balances of such former appropriations, which had previously been carried to the surplus fund under the requirements of law.

ATTORNEY-GENERAL'S OFFICE,
January 5, 1870.

SIR : I have considered the question of law presented by you in referring to me the letter of the First Comptroller to you of June 28, 1869, relating to the appropriations for the purpose of constructing and completing a building at Knoxville, Tennessee, to be used as a custom-house, post-office, and a United States court-house.

I assume that the facts are as stated in the letter of the First Comptroller, and that the appropriations for this purpose, made by the 18th and 19th sections of the act of August 18, 1856, (11 Stat., 92, 93,) were, pursuant to the 10th section of the act of August 31, 1852, (10 Stat., 98, 99,) on the 30th day of June, 1868, under the directions of the Secretary of the Treasury, carried on the books of the Treasury to the account of the surplus fund. The clause in the ap p tion act of March 3, 1869, (15 Stat., 305,) in these words, to wit: "For the completion of a custom-house, court-house, and post-office building at Knoxville, East Tennessee, *in addition to former appropriations, \$5,000,*" does not seem to me a further and specific appropriation of the moneys carried to the account of the surplus fund, such as is required by the 10th section of the act of August 31, 1852, in order to

Subrogation.

render the amounts appropriated by the act of August 18, 1856, available for the purpose named.

The letter of the Comptroller contains a reference to the usual form of language used in re-appropriating moneys carried to the account of the surplus fund; one example of which is found in such a re-appropriation for an iron lighthouse at Southwest Pass, by the act of March 2, 1867, (14 Stat., 460;) and it would seem that the attention of Congress was not called to the fact that the former appropriations for the building at Knoxville had been already covered into the Treasury at the time of the passage of the act of March 3, 1869.

Very respectfully, your obedient servant,

E. R. HOAR.

Hon. GEORGE S. BOUTWELL,

Secretary of the Treasury.

SUBROGATION.

Where a steamboat, previously insured by her owners, was impressed into the military service of the United States, and while in such service was lost, after which the underwriters paid the amount of their policies to the owners, who subsequently filed a claim against the United States for the value of the steamboat under the act of March 3, 1849, as amended by the act of March 3, 1863, and were allowed and paid the value thereof, less the amount received by them from the underwriters: *Held* that (the loss being such as, had there been no insurance on the steamboat, would have rendered the United States liable to pay her full value to the owners) the contract of insurance between the owners and the underwriters did not affect or diminish the liability of the Government; and that, as against the Government, the underwriters are entitled to be subrogated to the rights of the owners for the amount paid on their policies.

ATTORNEY-GENERAL'S OFFICE,

January 12, 1870.

SIR: I have considered the case of the steamer "Robert Campbell, jr.", submitted to Mr. Attorney-General Evarts by the late Secretary of the Treasury in his letter of September 4, 1868.

The facts of the case, and the questions of law on which an opinion is requested, are stated in the letter of the Acting

Subrogation.

Comptroller accompanying the letter of the Secretary of the Treasury, as follows, viz:

"The steamer Robert Campbell, jr., was owned at Saint Louis, Missouri, and there impressed into the military service of the United States on the 17th day of September, 1863. Eleven days thereafter, while yet in said service by impressment, she was totally destroyed by fire at or near Milliken's Bend, on the Mississippi River, under such circumstances as gave the owners a legal claim against the Government for her value under the act of Congress of March 3, 1849, (9 Stat., 414, 415,) as amended by the 5th section of the act of March 3, 1863, (12 Stat., 743.) At the time of the loss, certain insurance companies had outstanding policies on the steamer to the amount of \$25,000, all of which had been taken in April and June prior to the impressment, some for six, others for twelve months. The amount of these policies was paid to the owners by the underwriters, and application was made by the former to the accounting officers of the United States for the value of the boat under the laws above referred to. Their application was considered May 25, 1864, and the value of the boat fixed at \$57,000. From this amount, however, was deducted the sum of \$25,000 that had been paid by the underwriters, and the remaining \$32,000 were then paid to the owners. The insurance companies have now preferred a claim against the Government for re-imbursement of the amount paid by them to the owners, and on the following questions of law arising out of their claim the opinion of the Attorney-General is asked:

"1st. Did the underwriters, by payment of their policies, become subrogated to that extent to the rights of the owners to the indemnity provided by the act of Congress of March 3, 1849?"

"2d. On the facts stated, should the claim be considered as having originated, within the meaning of that term, as used in the act of February 19, 1867, (14 Stat., 397,) at Milliken's Bend, the place of loss, or at Saint Louis, the place of impressment and residence of the owners?"

The joint resolution of Congress No. 5, approved December 23, 1869, renders it, I suppose, unnecessary for me to consider the second question contained in the letter of the Act-

Subrogation.

ing Comptroller. Mr. Attorney-General Bates, in Beltzhoover's case, (10 Opns., 267,) considered the proper order in which should be presented the claims of the owners of a vessel, and of the insurance companies which had insured it, when the vessel had been lost while in the military service of the United States; but he did not express any opinion upon the liability of the Government to pay the full value of the vessel, if at the time of the loss she was insured against the peril by which she was lost, or upon the right of an insurance company which had paid the amount of its policy to be subrogated to the rights of the owners of the vessel as against the United States.

In the case now before me it appears there was no contract between the owners and the United States; but the steamer was in the military service of the United States by impressment, and, therefore, this is not a case in which "the risk to which the property would be exposed was agreed to be incurred by the owner." I assume that the loss was within the policies of insurance, and at the same time such as, if the steamer had not been insured, would have rendered the United States liable to pay her full value to the owners, under the 2d section of the act of March 3, 1849. The contract of insurance was not made at the request of, or on behalf of, the United States, nor did they pay the premium. The owners insured the steamer for their own benefit, and paid the premium out of their own money. I am unable to see how contracts of insurance, which are essentially contracts of indemnity made by the owners of property with the third person, can affect the liability of the United States to pay the full value of it, if the property be of the kind, and be employed and lost in the manner set forth in said 2d section. The principles on which the following cases were decided by the Supreme Court establish, I think, the right of the insurance companies to receive from the United States, in the place of the owners, who were insured, whatever amount of money less than the value of the steamer, and now remaining unpaid, these companies have paid the owners under their policies, and which the owners otherwise would be entitled to receive. *Comegys et al. vs. Vasse*, (1 Peters, 193;) *Carpenter vs. Provi-*

Right of Deserters to Bounty.

dence Washington Insurance Company, (16 Peters, 495;) Garrison et al vs. The Memphis Insurance Company, (19 How., 312.)

Very respectfully, your obedient servant,

E. R. HOAR.

Hon. GEO. S. BOUTWELL,
Secretary of the Treasury.

NOTE.—In addition to the authorities cited in the foregoing opinion, see *Hall and Long vs. Railroad Companies*, (13 Wall., 367,) as regards the doctrine of subrogation prevailing in cases of insurance.

RIGHT OF DESERTERS TO BOUNTY.

Upon the question presented by the Secretary of War, viz., as to the right of a deserter, whether tried and convicted by a court-martial or not, (if, when so tried and convicted, forfeiture of bounty or a dishonorable discharge is no part of the sentence,) on being returned to service and making up the time lost by his desertion, to receive the same bounty as if he had not deserted, or any bounty at all under the various statutes relating to bounty, the Attorney-General, in view of the fact that cases are pending in the Court of Claims in which substantially the same question must be considered and decided, and which may be ultimately carried before the Supreme Court, gives no opinion, but advises that the existing practice of the War Department in executing the bounty acts be continued until the question is judicially determined.

ATTORNEY-GENERAL'S OFFICE,

January 13, 1870.

SIR: The letter of General Rawlins, Secretary of War, of the date of May 31, 1869, called the attention of the Attorney-General to a letter from the Secretary of War of the date of November 14, 1866, which, with its accompanying papers, relates to a claim for bounty made in behalf of Jeremiah Holbrook, formerly a private in Company I, Sixtieth New York Volunteers. From these papers it appears that the Second Comptroller and the Judge-Advocate-General differ in opinion upon "questions relating to the forfeiture or loss of bounty by soldiers through desertion;" and it is understood that the Second Comptroller is of the opinion that desertion, *ipso facto*, works a forfeiture of bounty due and payable at the time of

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desertion, and renders the soldier incapable of receiving any bounty for any military service subsequently rendered during the same term or under the same contract of enlistment, because, in his opinion, the discharge of a soldier, even at the end of his term of service, if it appears that during that term he has deserted, cannot be an honorable discharge; and it is also understood that the Judge-Advocate-General holds that desertion does not, *per se*, affect the right of a soldier either to bounty or to an honorable discharge, and that if there has been no trial and conviction of a soldier for desertion, or, if tried and convicted, there is nothing in his sentence or punishment as imposed by a court-martial which necessarily subjects him to a dishonorable discharge and the forfeiture of bounty, the soldier, on completing his term of service, is entitled to an honorable discharge and bounty.

The Secretary of War, in the letter of November 14, 1866, states that "the policy of the Government, as indicated by uniform practice, has been in accordance with the rulings of the Treasury Department," (by which is meant, I suppose, the rulings of the Second Comptroller;) and after a citation of various acts of Congress and orders of the War Department, he asks the opinion of the Attorney-General whether these acts and orders "are such as to imperatively demand a change of the practice which has heretofore prevailed, and the adoption of the views of the Judge-Advocate-General, in the disposition of questions of bounty claimed by persons who have been guilty of the offense of desertion."

By the letter of May 31, 1869, the Secretary of War asks the opinion of the Attorney-General "as to the right of deserters to any bounty not expressly forfeited by the sentence of a court-martial or the conditions annexed to a mitigation of such sentence."

The facts in Holbrook's case are these: He enlisted as a private, August 27, 1862, for the term of three years; was mustered into service September 4, 1862, in Company H, 123d Regiment, New York Volunteers; deserted December 1, 1862; was apprehended May 14, 1864; was tried by a court-martial for desertion, convicted in the month of June following, and sentenced "to be returned to his regiment, or such other

Right of Deserters to Bounty.

regiment as the commanding-general may direct for duty, with the loss of all pay and allowances now due, and forfeit eight dollars per month for each and every month of his term of service, and to make good the time lost by desertion, which was from December 1, 1862, until May 14, 1864." The proceedings and sentence of the court were approved by the reviewing officer, and Holbrook and others, who were resting under a similar sentence, were ordered "to be sent to their respective regiments, provided their regiments are still in service; and in case these are mustered out, they will be assigned to some regiment by competent authority, and their sentences will be carried into execution." Holbrook was thereupon transferred to Company I, 60th New York Volunteers, in which company he served until it was mustered out of service July 17, 1865, when he was discharged. His claim, as I understand it, is for the bounty granted by the act of July 22, 1861, (12 Stat., 270.)

These papers, then, present the question whether Holbrook, upon the facts of his case, is entitled to the bounty provided by the act of July 22, 1861; and also the general question, whether deserters, whether tried and convicted before a court-martial or not, if when so tried and convicted the forfeiture or loss of bounty or a dishonorable discharge is no part of the sentence, are entitled, on being returned to service, and making up the time lost by such desertion, and serving out their term of enlistment, to receive the same bounty as if they had not deserted, or any bounty, under the various acts of Congress relating to bounty.

The uniform practice of the Department of War, it appears, has been in accordance with the opinion of the Second Comptroller, and the Attorney-General is asked to give an opinion whether, as a matter of law, he can say that this practice must be changed.

There are now pending in the Court of Claims cases in which substantially the same questions of law as are herein-before stated must be considered and determined, and if the judgment of that court is against the United States, an appeal will be taken to the Supreme Court of the United States. I think the Department of War may well continue in its present

Forfeiture of Bounty for Desertion.

practice, until these questions are determined by the Supreme Court.

Very respectfully, your obedient servant,

E. R. HOAR.

Hon. WILLIAM W. BELKNAP,

Secretary of War.

NOTE.—The question of forfeiture of bounty by desertion arose in the case of *The United States vs. Kelley*, decided by the Supreme Court of the United States at the December term, 1872, on appeal from the Court of Claims. The facts of that case, as shown by the record, were as follows: Kelley enlisted in the United States Army as a private on the 12th of February, 1864, for the term of three years, and served as such until the 3d of October, 1865, when he deserted. On the 19th of April, 1866, by order of his department commander, he was restored to duty without trial "with the condition that he make good the time lost by his desertion, viz., from October 3, 1865, to December 11, 1865." The condition was complied with by him; and having completed the full term of his enlistment, exclusive of the time lost by desertion, he was discharged by reason of the expiration of his term of service on the 20th of April, 1867, and was furnished with a certificate by the mustering officer in the usual form given to soldiers when honorably discharged the service.

Previous to his desertion, Kelley had been paid \$175 of the bounty of \$400 promised him by the terms of his enlistment; and upon his discharge from service he claimed that he was entitled to the additional sum of \$225, as unpaid balance of said bounty, but his claim was denied by the Pay Department on the ground that the bounty had been forfeited by desertion.

Suit having been brought by Kelley in the Court of Claims to recover the unpaid balance of bounty claimed, that court gave judgment in his favor therefor, which judgment was affirmed by the Supreme Court, the latter holding that, under the circumstances, the bounty was not forfeited.

FORFEITURE OF BOUNTY FOR DESERTION.

The installments of bounty provided by the act of July 4, 1864, which are *not already due and payable* to a soldier at the time he deserts, never become due and payable in case he does not return or is not returned to service, and are not *forfeited* in the legal sense of that word.

Nor, in case the deserter returns, or is apprehended and put back into service, are such installments forfeited *on account of desertion* within the meaning of those words in the act of March 21, 1866; because either the soldier, on serving out his term, is entitled to receive them, or they never become due and payable by reason of his desertion.

Forfeiture of Bounty for Desertion.

But the installments of bounty, *due and payable* at the time of desertion, are forfeited thereby, in both those cases, and become payable to the board of managers of the National Asylum for Disabled Volunteer Soldiers under the said act of March 21, 1866.

The various statutes relating to bounty reviewed and considered in connection with the Army Regulations relating to forfeiture for desertion.

ATTORNEY-GENERAL'S OFFICE,

January 18, 1870.

SIR: Your letter of the 6th of October last contains a communication from Hon. Benjamin F. Butler to the Second Comptroller, with an indorsement of the Comptroller thereon. You ask my opinion upon the questions of law stated in that communication.

The 5th section of the act of March 21, 1866, (14 Stat., 10,) appropriates for the establishment and support of the National Asylum for Disabled Volunteer Soldiers, among other things, "all forfeitures on account of desertion." The 1st section of the act of July 4, 1864, (13 Stat., 379,) authorizes the President to call for volunteers for one, two, and three years' service, and provides that "every volunteer who is accepted and mustered into the service for a term of one year, unless sooner discharged, shall receive and be paid by the United States a bounty of one hundred dollars; and if for a term of two years, unless sooner discharged, a bounty of two hundred dollars; and if for a term of three years, unless sooner discharged, a bounty of three hundred dollars; one-third of which bounty shall be paid to the soldier at the time of his being mustered into the service, one-third at the expiration of one-half of his term of service, and one-third at the expiration of his term of service."

The questions propounded to me, as I understand them, are, whether this bounty, or any part of it, is forfeited on account of desertion, and payable to the board of managers of the asylum in either of the two following cases: *First*, when a volunteer who is accepted and mustered into the military service under this act for the term of three years, for example, deserts at the end of twelve months, for example, without having received any part of the bounty, and never returns, or is returned, into service; and, *second*, when such a deserter returns, or is returned, into service without trial by

Forfeiture of Bounty for Desertion.

court-martial, by an authority competent to order a trial, and then serves out his term and receives a discharge.

I am informed that the Second Comptroller and the Judge-Advocate-General differ in opinion upon these questions. The Second Comptroller, it is understood, holds that the bounty provided by this act is comprehended in the words "pay and allowances," which, if due at the time of desertion, are forfeited by paragraph 1358 of the revised Army Regulations of 1863, and that this forfeiture is incurred by desertions, although the soldier is never tried and convicted by a court-martial of desertion, but is, if apprehended, returned to the service without trial, pursuant to paragraph 159 of the Army Regulations; and that if a deserter so returned, or is returned, into service, and serves out his term, and receives a discharge, he yet is not entitled to be paid the installments of bounty made payable by the act at periods which are, in fact, subsequent to the time of his desertion, because he holds that a discharge after desertion is not an honorable discharge, and the soldier so deserting has not performed his contract of service according to its legal effect.

The Judge-Advocate-General, it is understood, holds that desertion does not in itself affect the right of a soldier to receive either bounty or an honorable discharge, and that if there has been no trial and conviction of a soldier for desertion, or, if tried and convicted, there is nothing in his sentence or punishment as imposed by a court-martial which subjects him to a dishonorable discharge or to the forfeiture of bounty, the soldier, on completing his term of service, is entitled to an honorable discharge and to bounty; that desertion is a crime, and, for the purposes of forfeiture, no soldier can be held to have deserted unless he is convicted of that crime, and, if so convicted, can be subjected to no punishment not included in his sentence.

In the case of a soldier who deserts and never voluntarily returns, or is not apprehended and returned to service, I understand that both the Second Comptroller and the Judge-Advocate-General agree that he is not entitled to receive the installments of bounty which are made payable at periods, in fact, subsequent to the desertion; and it seems to me there can be no doubt that such is the law. The language of the

Forfeiture of Bounty for Desertion.

act is that every volunteer who is accepted and mustered into the service shall receive and be paid a bounty, one-third to be paid at the time of his being mustered into the service, one-third at the expiration of one-half his term of service, and one-third at the expiration of his term of service. It seems to me plain that if he do not serve out one-half his term of service, he is not entitled to be paid the second third part of his bounty. Even upon the settled rules of law applicable to the contracts between persons, the contract of enlistment must be regarded as an entire contract, at least in reference to each installment of bounty; and the soldier, by deserting, having broken the contract without right on his part, and never having returned or been returned into service, would not be entitled to recover anything under the contract not due and payable absolutely at the time of his desertion ; and the doctrine of those courts which hold that for labor performed under an entire contract broken by the laborer without just cause, an action will lie to recover a *quantum meruit*, can have no application to claims for bounty; nor are the accounting officers authorized by law to determine how much bounty a soldier who has deserted and never returns, or is returned into service, reasonably deserves for the services rendered up to the time of his desertion.

In the case supposed of a deserter who returns, or is apprehended and put back into service by competent authority, and serves out his term, if the opinion of the Judge-Advocate-General that this soldier is entitled to receive the whole bounty provided by the act is correct, then nothing is forfeited on account of the desertion, and nothing is to be paid to the asylum. If the opinion of the Second Comptroller is the correct one, then the soldier is not entitled to receive the installments of bounty becoming payable after his desertion, not because he ever had the vested right to be paid these installments and has forfeited it, but because he has not performed his contract in such a manner that he ever becomes entitled to receive these installments ; he has not performed what the Second Comptroller regards as a condition precedent to his receiving these installments of the bounty.

The asylum is to receive the forfeitures on account of desertion; that is, the sums forfeited by soldiers in conse-

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quence of their desertion; and this cannot, I think, be extended to include what was never due to the soldier. If in consequence of desertion he did not afterward become entitled to receive what otherwise he might have been entitled to receive, because by desertion he had rendered himself incapable of fully performing his contract, this incapacity which he brought upon himself, and the loss of bounty resulting therefrom, are not a forfeiture, as that word is used in penal statutes.

The opinion of Mr. Butler appears to be that the bounty is due absolutely *in praesenti*, but is payable, in part, *in futuro*; that the whole bounty is a debt certain upon the volunteer's being mustered into service, and, though payable in installments, becomes wholly payable by the mere lapse of time, and without any regard to whether any military service has been performed or not.

A comparison of some of the other acts passed by Congress from time to time, relating to bounty, with this act of July 4, 1864, indicates that the reasons for granting the bounty provided by the last-named act were, first, to induce men to enlist, and, secondly, to induce them when enlisted faithfully to perform military service during the term of their enlistment. Some of these acts are to be found in 1 Stat., pp. 222, 242, 430, 484, 558, 604, 751; 2 Stat., 669, 672, 792; 3 Stat., 147; 4 Stat., 647; 5 Stat., 260; 9 Stat., 118, 125, 184, 439; 10 Stat., 701; after which comes the series of acts relating to bounty enacted during or in reference to the late rebellion.

The first provisions of the acts already referred to seem to have been enacted for the purpose of encouraging men to enter or re-enter the military service, and the soldier became entitled to the bounty on enlistment. Afterward a portion of the bounty was payable to the soldier on enlistment, and the remainder after he had joined the corps in which he was to serve, or the Army; and still later an additional bounty was allowed the soldier upon his discharge from the Army upon a certificate that he had faithfully performed his duty while in the service.

Of the acts passed during or in reference to the late rebellion, the 5th section of the act of July 22, 1861, (12 Stat., 216,) provided that volunteer soldiers who entered the military

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service under that act were to be allowed, when honorably discharged after having served for a period of two years, or during the war if sooner ended, a bounty of \$100. By the 5th section of the act of July 29, 1861, (12 Stat., 280,) the same bounty was authorized to be paid to men enlisted in the regular forces after the 1st of July, 1861. The 6th section of the act of July 5, 1862, (12 Stat., 509,) allowed \$25 of this bounty to be paid immediately after enlistment to every soldier of the regular and volunteer forces thereafter enlisted. The 3d section of the act of July 17, 1862, (12 Stat., 588,) gave to each volunteer soldier who enlisted under the provisions of that act for the period of nine months, unless sooner discharged, a bounty of \$25, which, with his first month's pay, he was entitled to receive on the mustering of his company or regiment into the service of the United States; and to each volunteer soldier who enlisted for twelve months, unless sooner discharged, a bounty of \$50, one-half of which was to be paid upon his joining his regiment, and the other half at the expiration of his enlistment.

The 18th section of the act of March 3, 1863, (12 Stat., 734,) provided that such volunteers and militia-men then in service as should re-enlist to serve one year, unless sooner discharged, after the expiration of their existing term of service, should be entitled to a bounty of \$50, one-half to be paid upon such re-enlistment, and the remainder at the expiration of the term of enlistment, and such as should re-enlist to serve for two years, unless sooner discharged, should receive upon such re-enlistment \$25 of the \$100 bounty allowed by the 5th section of the act of July 22, 1861; and the 11th section of the same act put drafted men, enrolled, &c., on the same footing in all respects as volunteers for three years or during the war, including advanced pay and bounty then provided by law.

The 7th section of the act of March 3, 1863, (12 Stat., 743,) gave to persons who should volunteer or be drafted into the service of the United States for the term of nine months, or a shorter period upon any requisition thereafter made by the President for militia, the right to enlist into a regiment from the same State to serve for the term of one year; and, if so enlisting, they were entitled to receive a bounty of \$50, to be

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paid in the time and manner provided by the act of July 22, 1861.

On June 25, 1863, the Secretary of War issued General Order No. 191 for recruiting veteran volunteers, by which every volunteer who should re-enlist or be mustered into the service as a veteran for three years or during the war, was offered a bounty and premium of four hundred and two dollars, a part of which was payable upon being mustered into service, another installment at the first regular pay-day, or two months after being mustered in, and another at the first regular pay-day after six months' service, and so on at intervals of six months until the expiration of the three years' service. This order contained a provision that, if the Government should not require these troops for the full period of three years, and they should be mustered *honorably* out of service before the expiration of the term of their enlistment, they should receive, on being mustered out, the whole amount of bounty remaining unpaid the same as if the full term had been served out. By an order of the War Department issued December 23, 1863, the six months' men then in service, who desired to re-enlist for three years or during the war, were offered a bounty of three hundred dollars, part of which was to be paid upon being remustered into the service, and the remainder in installments at periods corresponding with those designated in the previous order. This order contained a provision that payment would be made to the troops thus re-enlisted of the whole amount of bounty remaining unpaid should the Government not require their services for the full period of three years, and should they be mustered honorably out of the service before the expiration of their term of enlistment. Joint resolution No. 3, approved December 23, 1863, (13 Stat., 399,) joint resolution No. 5, approved January 13, 1864, (13 Stat., 400,) and joint resolution No. 17, approved March 3, 1864, (13 Stat., 403,) are held to have sanctioned the issuing of these orders.

Then follow the act of July 4, 1864, (13 Stat., 379,) and the act of July 28, 1866, (14 Stat., 322,) which, by the 12th and 13th sections, provides for the payment of additional bounties to certain soldiers who have enlisted for certain periods therein named, and have served the time of their enlistment and been

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honorable discharged on account of wounds, or who have been honorably discharged after serving two years, having enlisted for a period of not less than two years, and who have received, under laws then existing, certain bounties named in those sections. The last act is that of March 3, 1869, (15 Stat., 334.) The 24th section of the act of February 24, 1864, (13 Stat., 11,) and the 2d, 3d, and 4th sections of the act of June 16, 1864, (13 Stat., 129,) relate to the bounty of colored troops.

From an examination of these statutes in connection with the act of July 4, 1864, all being in *pari materia*, and from the language of some of them to the effect that bounty is to be paid upon a certificate that the soldier has faithfully performed his duty while in service, or is to be paid upon an honorable discharge after serving out his term, and the language of the orders of the War Department, which were sanctioned by the joint resolutions, it is evident that Congress intended that there should be actual service by the soldier in order to entitle him to receive installments of bounty payable at times subsequent to his enlistment, and that the performance of this service is a condition-precedent to the soldier's receiving these installments of bounty, and such seems to be the natural construction of the 1st section of the act of July 4, 1864.

This 1st section also provides that, in case of the death of the soldier while in service, the residue of his bounty unpaid shall be paid to his widow, if he shall have left a widow, if not, to his children, and if there be none, to his mother if she be a widow; and the argument is, that this provision shows that the whole bounty is due to the soldier on being mustered into service, although payable in part in the future, as the whole residue unpaid is payable to the representatives named in the case of his death. Whether any, and, if any, what part of the bounty granted to a soldier, and remaining unpaid, be payable to any person if he die in service, depends entirely upon the language of the statute, as without any statutory provision it is not payable to his legal representatives or heirs. The 6th section of the act of July 22, 1861, (12 Stat., 270,) after making provision for volunteers who are wounded or otherwise disabled in the service, provides that the widow, if there be one, and if not, the legal heirs of such as die or

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may be killed in service, in addition to all arrears of pay and allowances, shall receive the sum of one hundred dollars, although this sum of one hundred dollars was payable to the soldier only when honorably discharged, and if he shall have served for a period of two years or during the war, if sooner ended.

General Order No. 191, hereinbefore referred to, declared that the legal heirs of volunteers who die in service shall be entitled to receive the whole bounty remaining unpaid at the time of the soldier's death, and the same provision was in the order of the War Department of December 23, 1863, although the installments of bounty offered by these orders were, as I think, payable to the soldier only in case he was in service when they became payable by the terms of the order, or had served out his term of service, and if he was not required for the whole period of three years, and was mustered out before the expiration of his term of service, the whole amount of bounty remaining unpaid became payable to the soldier only in case he were honorably mustered out of service. The 12th and 13th sections of the act of July 28, 1866, (14 Stat., 322,) after providing for a soldier honorably discharged on account of wounds received in the line of his duty, provide that "the widow, minor children, or parents, in the order named, of any such soldier who died in the service of the United States, or of disease or wounds contracted while in the service and in the line of duty, shall be paid the additional bounty hereby authorized," &c., although the soldier, if he be not honorably discharged on account of wounds received in the line of duty, is not entitled to receive the additional bounty thereby authorized, unless he has been honorably discharged after having served the time of his enlistment in the one case, or, having enlisted for a period of not less than two years, has been honorably discharged after serving two years in the other case.

From these statutes it is evident that the representatives named in them of a soldier who dies in service, may be entitled to receive a bounty which the soldier was not absolutely entitled to receive when he died, and the right to receive which was, at the time of his death, contingent upon his serving out his term, or being honorably mustered out or

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honorable discharged ; and the provisions of other statutes hereinbefore cited, relating to bounty, show that a grant to certain representatives of a soldier who dies in service of the whole bounty, is no evidence that the whole bounty is due absolutely to the soldier at the time of his death ; as, for example, by section 4 of the act of December 10, 1814, (3 Stat., 147,) a soldier is entitled to a land bounty only when discharged from service and on obtaining from the commanding officer a certificate that he has faithfully performed his duty while in service; but if he is killed or dies in service, his widow and children, or if there be no widow or child, his parents, become immediately entitled to it.

I have, then, no hesitation in saying that the installments of bounty provided by the act of July 4, 1864, that are not due and payable at the time of desertion, if the deserter never returns or is returned into service, never become due and payable, and are not forfeited in the legal sense of that word; and if the deserter returns, or is apprehended and is put back into service without a trial, these installments are not forfeited *on account of desertion* within the meaning of those words in the act of March 21, 1866; because either the soldier on serving out his term is entitled to receive them, or they never become due and payable by reason of his desertion.

In regard to that part of the bounty due and payable to the soldier at the time he deserts, which in each of the cases supposed is the sum of one hundred dollars, I think that sum in both these cases, and no more, is forfeited and becomes payable to the board of managers of the asylum.

By the Revised Army Regulations of 1863, paragraph 1358, the forfeiture incurred by desertion is limited to the pay and allowances due at the time of desertion. By the Army Regulations of 1821, p. 313, it was provided that "every soldier who may desert shall forfeit all *pay* and *bounty* due to him at the time of his desertion." By the Regulations of 1835, p. 21, it was provided that "every soldier who deserts the service shall forfeit all the *pay*, *clothing*, and *allowances* which may be due at the time of his desertion;" and the same provision was in the Army Regulations of 1841, p. 22, and in the Regulations of 1847, p. 42. The Regulations of 1857,

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par. 1183, declare that "every deserter shall forfeit all pay and allowances due at the time of desertion," which is the same provision that is found in the Regulations of 1861 and 1863. These Regulations were, I suppose, issued pursuant to the 5th section of the act of March 3, 1813, (2 Stat., 819,) and the 9th section of the act of April 24, 1816, (3 Stat., 298,) and by the 37th section of the act of July 28, 1866, (14 Stat., 337,) are established as a part of the law of the military service.

By comparing these provisions of these regulations with the laws in force at the time they were respectively issued, it seems that they were intended to forfeit everything due the soldier from the United States under his contract of enlistment at the time of his desertion, and I understand that the Department of War has uniformly held that in the pay and allowances which are by the Regulations forfeited by desertion, if then due, is comprehended all bounty which is then due and payable. That Congress may have intended that the words "pay and allowances" in the Regulations should be construed in this general sense, when it enacted that these Regulations should remain in force, seems probable from the language of the acts theretofore passed relating to bounty. By the 3d section of the act of December 12, 1812, (2 Stat., 788,) it is enacted that certain recruits shall be entitled "to the same *bounty* in money and land, and to all *other allowances*," &c., "as if," &c. The 7th section of the act of May 30, 1796, (1 Stat., 484,) provides that "there shall be *allowed* and *paid* to each soldier," &c., "a *bounty*," &c. Section 12 of the act of March 16, 1802, (2 Stat., 135,) uses the words, "there shall be *allowed* and *paid* * * * a *bounty*;" so do section 2 of the act of December 24, 1811, (2 Stat., 669,) and section 12 of the act of January 11, 1812, (2 Stat., 672.) The 3d section of the act of March 2, 1833, (4 Stat., 647,) provides for the payment of two months' extra pay "besides the pay and other allowances which may be due." Section 2 of the act of January 12, 1847, (9 Stat., 118,) uses the words "*allowed* and *paid*," &c., "a *bounty*." Section 9 of the act of February 11, 1847, (9 Stat., 125,) *allows* the option to the soldier to receive a certificate or warrant, or a Treasury scrip. Section 3 of the act of June 17, 1850, (9 Stat., 439,) provides

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for a *bounty* to be *allowed* to each recruit. Section 6 of the act of July 5, 1862, (12 Stat., 509,) enacts that section 5 of certain acts therein named "shall be so construed as to *allow* twenty-five dollars of the *bounty*," &c., "to be *paid*," &c. Section 4 of the act of June 15, 1864, (13 Stat., 129,) uses the words "*pay, bounty, and clothing allowed* to such persons."

From these references to the statutes it appears that the words "pay and allowances" may be understood in a general sense as including all emoluments paid or allowed to a soldier; and an express enactment by Congress in 1866, that the existing regulations should remain in force, with a knowledge on its part, which, I think, may be presumed, that these regulations had been uniformly so interpreted by the War Department that deserters, in forfeiting under them pay and allowances, were held to forfeit bounty, may properly be regarded to be so far a legislative sanction of such construction as to justify the Department in continuing to act upon it.

The Revised Army Regulations of 1863, paragraphs 155 to 162, and paragraphs 1358 to 1360, are applicable, when it is not otherwise expressly stated, to a deserter who is entered as such on the muster-roll, although he has never been tried and convicted of desertion by a court-martial. A soldier who has received pay or who has been duly enlisted in the service of the United States, and is convicted by a court-martial of having deserted the same, by the rules and articles of war may be sentenced to suffer death or such other punishment as the court-martial shall inflict, except that no soldier shall be subjected to the punishment of death in time of peace; and by section 12 of the act of February 2, 1813, (2 Stat., 796,) and by previous acts, a deserter may be compelled to make up the time lost by desertion. The forfeiture incurred by a deserter under paragraph 1358 of the Regulations is not a fine which the soldier may be compelled to pay out of any property he possesses, by imprisonment if need be; nor is it, strictly speaking, a punishment, but it relates solely to the soldier's rights under his contract of enlistment, and is a forfeiture of moneys that were due and payable under it in consequence of this contract, and still would be if he had not deserted; and for the purpose of determining what the soldier's rights are, to receive money from the United States under or in conse-

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quence of this contract, the fact of desertion need not be established by the record of a court-martial.

As the entry of desertion on the muster-roll may sometimes have been improperly made, and may afterward be canceled by the War Department on proof that the soldier did not desert, it may happen that the soldier, by the cancellation of such an entry, becomes entitled to bounty previously withheld from him.

Whether any precautions should be taken to secure the repayment by the asylum into the Treasury of such sums as may be paid to it as forfeitures on account of desertion, which, by a cancellation of the entry of desertion on the muster-roll, after payment to the asylum, have become payable to the soldier, it is not necessary for me to express my opinion. If no bounty is due and payable to a soldier at the time of his desertion, then he forfeits none under the Army Regulations.

I have not considered the case of a soldier who has been convicted of desertion by court-martial, and has been sentenced, as I do not understand that any such case was submitted to me. Neither have I considered the force and effect of the 21st section of the act of March 3, 1865, (13 Stat., 499,) and the proclamation of the President thereunder, of March 11, 1865, (13 Stat., 752,) upon the rights of deserters to bounty, who, within sixty days from the date of that proclamation, returned to their regiments and companies, or to such other organizations as they may have been assigned to, and served the remainder of their original terms of enlistment, and, in addition thereto, a period equal to the time lost by desertion. See opinion of Mr. Attorney-General Speed of May 6, 1865, (11 Opins., 223.)

Very respectfully, your obedient servant,

E. R. HOAR.

Hon. GEORGE S. BOUTWELL,
Secretary of the Treasury.

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BOUNTIES.

The provisions of the 1st section of the act of March 3, 1868, extend to the claims for bounty of soldiers who enlisted under the act of July 4, 1864. Under the various bounty acts passed from time to time previous to the act of March 3, 1869, soldiers were not in general entitled to receive the whole of the bounty provided for the term of their enlistment, until they had actually served out the full term; and the effect of the 1st section of that act is to make an exception in favor of those whose discharges state that they were discharged by reason of the expiration of their term of service, although in fact they did not serve out the full term of their enlistment.

What the term of enlistment was, in any case, must be ascertained from the enlistment papers, or rolls, or documents, or from any other sources of information which, by law, are evidence of the contract of service; and the soldier should be paid the bounty allowed by law for that period of service, whatever in such case it may be.

The War Department has power to correct mistakes made in granting discharges to soldiers.

Soldiers who enlisted for three years or during the war, and were discharged by reason of the termination of the war, are to be regarded as having served out the period of their enlistment, and are entitled to the additional bounty granted by the 12th section of the act of July 28, 1866; and their discharges need not state that they were discharged by reason of the expiration of their term of service to entitle them to be paid that bounty.

ATTORNEY-GENERAL'S OFFICE,
January 19, 1870.

SIR: I have received your letter of the 4th of May last, with a communication from the Second Comptroller to you inclosed; and you ask my opinion upon the questions proposed by the Second Comptroller in that communication.

The first question relates to the construction of the 1st section of the act of March 3, 1869, (15 Stat., 334,) which is in these words: "that, when a soldier's discharge states that he is discharged by reason of 'expiration of term of service,' he shall be held to have completed the full term of his enlistment, and be entitled to bounty accordingly."

The Comptroller, referring to the act of July 4, 1864, (13 Stat., 379,) states that soldiers who enlisted under this act, and who were discharged before the expiration of their term

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of enlistment by reason of the close of the war, or because their services were no longer required, have heretofore been paid only the installments of bounty that were payable on or before the time of their discharge, in accordance with the opinion of Mr. Attorney-General Speed of May 6, 1865, (11 Opins., 224;) but that claims for the remaining installments of bounty provided by this act have been presented in behalf of these soldiers under the 1st section of the act of March 3, 1869. And the Comptroller asks, whether soldiers who enlisted under the act of July 4, 1864, are within the meaning of the 1st section of the act of March 3, 1869, if their discharge states that they were discharged by reason of *expiration of term of service*.

A doubt seems to have arisen in the minds of the Second Auditor and Second Comptroller in regard to this question, from the language of the title of the act of March 3, 1869, which is, "An act in relation to additional bounties, and for other purposes," and because soldiers who enlisted under the act of July 4, 1864, are not entitled to the additional bounties provided by the 12th and 13th sections of the act of July 28, 1866, (14 Stat., 322,) and because the 2d, 3d, and 4th sections of the act of March 3, 1869, are applicable only to claims for the additional bounties provided by the act of July 28, 1866.

The language of the 1st section of the act of March 3, 1869, is general, and, taken alone and in its ordinary signification, is as applicable to soldiers who claim bounties under the act of July 4, 1864, as to those who claim under the act of July 28, 1866. The reason why this section was enacted is, I suppose, that a soldier who had been discharged for the alleged reason of the expiration of his term of service, even if the full term of his enlistment had not actually expired at the time of his discharge, was considered to have substantially served out his term, and to have been discharged from service by the United States for their own convenience. The discharge of a soldier because his services were no longer required, or because the war had ended, is not the same thing as a discharge by reason of the expiration of his term of service; although soldiers who were enlisted for three years or during the war, and who were discharged by reason of the termination of the war, are held to have completed the full term of

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their enlistment, because their contract of enlistment was in the alternative, for *three years or during the war*, and when the war ended the term of their enlistment ended. And soldiers who were enlisted under certain orders of the War Department, and who were discharged because the United States did not longer require their services, were by the express words of the orders under which they enlisted, if mustered honorably out of service before the expiration of their term of enlistment, entitled to be paid the whole amount of bounty remaining unpaid, the same as if they had served out the full term.

As the language of the 1st section of the act of March 3, 1869, is general, as it is equally applicable to all soldiers, and as the act by its title purports to have been passed for other purposes than in relation to additional bounties, as well as in relation to such bounties, I have no doubt that its provisions extend to the claims for bounty of soldiers who enlisted under the act of July 4, 1864.

The second question relates to soldiers who enlisted and were put into old organizations during the years 1862 and 1863, under authority from the Department of War to the governors of some of the States, to fill up the regiments of their States by enlisting men for the unexpired term of these regiments. The exact words of the authority granted by the War Department are not given, but it is said that the men so enlisted were discharged with the organizations to which they had been assigned, generally after serving but a few months; and the discharges of some of them state that they were discharged by reason of "expiration of term of service." In some cases their enlistment papers, rolls, and discharge certificates show that they were enlisted for three years or during the war. In others their discharge certificates recite an enlistment for three years, while their enlistment papers and rolls both show an enlistment for the unexpired term of the organizations to which they were assigned. The question asked, as I understand it, is, whether, under the 1st section of the act of March 3, 1869, soldiers who were enlisted and discharged in the manner above set forth are entitled to receive the bounty provided for soldiers who enlisted for the full term of three years, or only the bounty provided for sol-

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diers who enlisted for terms equivalent to the unexpired terms of the different organizations to which these soldiers were assigned. The Comptroller, in considering this question, says that if these soldiers are regarded as three years' men, and are paid full bounty under the act of March 3, 1869, it will frequently happen that a man will get fifty dollars more bounty for a service of less than one year than one who enlisted for two years and served faithfully the full term of his enlistment.

The 1st section of the act of March 3, 1869, plainly entitles a soldier who has been discharged by reason of expiration of term of service, to receive the same bounty as if he had actually served out the full term of his enlistment. Under the various bounty acts passed from time to time previous to the act of March 3, 1869, soldiers were not in general entitled to receive the whole of the bounty provided for the term of enlistment until after they had actually served out the full term. An exception, however, to this general rule was made in favor of those soldiers who were wounded or otherwise disabled in service, and were, in consequence of such wounds or disability, discharged before the expiration of the term for which they had been enlisted, and also in favor of the representatives of the soldiers who had died in service. See sections 5 and 6 of the act of July 22, 1861, (12 Stat., 270;) section 6 of the act of July 5, 1862, (12 Stat., 509;) section 1 of the act of July 11, 1862, (12 Stat., 535;) sections 3 and 4 of the act of July 17, 1862, (12 Stat., 598;) section 18 of the act of March 3, 1863, (12 Stat., 734;) sections 6 and 7 of the act of March 3, 1863, (12 Stat., 743-4;) act of March 3, 1863, (12 Stat., 758;) section 1 of the act of July 4, 1864, (13 Stat., 379;) section 4 of the act of March 3, 1865, (13 Stat., 488;) and sections 12 and 13 of the act of July 28, 1866, (14 Stat., 322.)

The effect, then, of the 1st section of the act of March 3, 1869, is to make a similar exception in favor of enlisted men whose discharges state that they were discharged by reason of the expiration of their term of service, although, in fact, they did not serve out the full term of their enlistment. If the term of the enlistment of any of these men was for three years, they should be paid the bounty allowed by law for

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three years' service; if it was for the remainder of the term of the organizations to which they were assigned, then they should be paid the bounty allowed by law for that period of service, whatever in each case it may be. What the term of enlistment was in any case, must, of course, be ascertained from the enlistment papers or rolls or documents which constitute the contract of service, or from such other sources of information as, by law, are evidence of this contract. Such a contract cannot be varied by showing any oral promise by enlisting or mustering officers to the men enlisted, to discharge them with the regiments to which they were assigned.

I do not, however, doubt the power of the War Department to correct mistakes in granting discharges to soldiers; and if any of the discharge-certificates of these soldiers state that they were discharged by reason of the expiration of their term of service, when in fact they were discharged by reason of the expiration of the term of service of the regiment into which they had been mustered, and the soldier understood when he entered the service that he was to be discharged at the expiration of the term of service of this regiment, and assented to it, or understood when he was discharged that he was discharged on that ground, and assented to it, I think the Department of War, on proof of such facts, has the right to withdraw the discharge issued, which purports to discharge the soldier by reason of the expiration of his term of service, and which is contrary to the fact, and to issue instead a discharge which shall correctly set forth the fact. I do not, however, mean to express any opinion whether, if the legal effect of the contract of the soldier was an enlistment for three years, and he was willing to perform three years' service, the United States could, by discharging him without or against his consent before the expiration of that term, take from him the right to receive the whole bounty provided by law for soldiers who enlisted for, and served out the term of, three years.

The third question asked relates to the payment of the additional bounty granted by the 12th section of the act of July 28, 1866, (14 Stat., 322,) to soldiers who were discharged pursuant to certain orders issued by the War Department for the reduction of the Army. One rule prescribed by the Sec-

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retary of War for the payment of bounties under this act, is that soldiers who enlisted for three years or during the war, and were discharged by reason of the termination of the war, should be considered as having served out the period of their enlistment, and should be paid bounty accordingly. And, in compliance with this rule, soldiers who enlisted for three years or during the war, and were discharged by reason of the termination of the war, have been paid the additional bounty granted by the 12th section of the act of July 28, 1866. The question asked me is, "Should this practice be continued, or must the discharge state that the soldier was discharged by reason of 'the expiration of term of service' to entitle him to full bounty?"

The 12th section of the act of July 28, 1866, provides that "each and every soldier who enlisted * * * * for a period of not less than three years, and having served the time of his enlistment, * * * * shall be paid the additional bounty," &c.; and the rule mentioned seems to be founded upon the view that a soldier who enlisted for three years or during the war is within this provision, and that although discharged on account of the termination of the war before the three years have expired, the terms of his contract of enlistment have nevertheless been fully performed, and he has served the time of his enlistment within the meaning of the act.

I find that the "rules and regulations for the payment of bounties under the act to equalize bounties, approved July 28, 1866," issued by the War Department September 16, 1866, provide (Rule No. 8) that "soldiers enlisted for three years or during the war, who were discharged by reason of the termination of the war, shall be considered as having served out the period of their enlistment, and are entitled to bounty under this act;" and that on these *rules and regulations* is the following indorsement under the date of September 15, 1866, to wit: "I have examined these amended regulations, and am of opinion that they are in conformity with law. Henry Stanbery, Attorney-General."

I am of opinion that the practice of paying these soldiers the bounty granted by the 12th section of the act of July 28, 1866, as it has received the sanction of Mr. Stanbery, may be

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continued, and that the discharge of the soldier need not state that he was discharged by reason of expiration of term of service to entitle him to be paid this additional bounty.

Very respectfully, your obedient servant,

E. R. HOAR.

Hon. GEORGE S. BOUTWELL,

Secretary of the Treasury.

TENURE OF OFFICE ACT.—SUSPENSION OF OFFICERS.

The mere designation by the Postmaster-General of a special agent of the Post-Office Department to take charge of a post-office, which at the time was held by a postmaster who had been appointed thereto by and with the advice and consent of the Senate, is not, either expressly or by just implication, a compliance with the terms and conditions upon which, by the provisions of the 2d section of the tenure of office act of March 2, 1867, the President was authorized to suspend an officer.

Accordingly, where, after such designation of a special agent, a postmaster was able, ready, and willing to perform his official duties: *Held* that he was entitled to the compensation provided by law.

ATTORNEY-GENERAL'S OFFICE,

January 20, 1870.

SIR: I have considered your letter of December 20, 1869, in which you ask for my opinion upon the question whether Foster Blodgett, the postmaster of Augusta, Georgia, was legally suspended from his office; and if not, whether he is entitled to compensation from the 1st of January, 1868, until the 30th of March, 1869. It appears from the statements in your letter that in July, 1865, Mr. Blodgett was appointed postmaster of Augusta, and his appointment confirmed by the Senate on the 27th of July, 1866. It further appears that by an order of the then Postmaster-General, the Hon. A. W. Randall, dated January 3, 1868, George W. Summers was designated as a special agent of the Post-Office Department to take charge of the post-office at Augusta, Georgia, of which Mr. Blodgett was notified on January 3, 1868.

By the statute of March 2, 1867, (14 Stat., 430,) entitled "An act regulating the tenure of certain civil officers," which is the statute governing the case, it was provided "that every person holding any civil office to which he has been appointed by and with the advice and consent of the Senate

Tenure of Office Act. Suspension of Officers.

* * * shall be entitled to hold such office until a successor shall have been in like manner appointed and duly qualified, except as herein otherwise provided." By the 2d section of the act, "when any officer appointed as aforesaid, excepting judges of the United States courts, shall, during a recess of the Senate, be shown, by evidence satisfactory to the President, to be guilty of misconduct in office or crime, or for any reason shall become incapable or legally disqualified to perform its duties, in such case, and in no other, the President may suspend such officer, and designate some suitable person to perform temporarily the duties of such office until the next meeting of the Senate, and until the case shall be acted upon by the Senate, * * * and in such case it shall be the duty of the President, within twenty days after the first day of such next meeting of the Senate, to report to the Senate such suspension, with the evidence and reasons for his action in the case, and the name of the person so designated to perform the duties of such office."

I am unable to see that, under the provisions of this statute, the mere designation by the Postmaster-General of a special agent of the Post-Office Department to take charge of a post-office is, either expressly or by just implication, a compliance with the terms and conditions upon which an officer can be suspended by the President. If it were to be held that an order of the Postmaster-General is to be considered in any matter concerning his Department as the act of the President, upon the principles laid down in *The United States vs. Eliason*, (16 Peters, 291,) and *Wilcox vs. Jackson*, (13 Peters, 513,) and in the case of *Satterlie Clark*, (2 Opins., 67,) I should still be of opinion that the law had not been complied with so as to make a valid suspension of Mr. Blodgett from his office. There is no record proof furnished by you that the President, or the Postmaster-General professing to act by his authority, had any evidence that Mr. Blodgett was guilty of misconduct in office or crime, or for any reason had become incapable or legally disqualified to perform its duties.

The first time that the word "suspended" is found in the papers submitted is when the President, during the session of the Senate, on the 14th of July, 1868, sent in the nomina-

Reinstating Retired Army Officers.

tion of George W. Summers as postmaster at Augusta, Georgia, in place of Foster Blodgett, "suspended," which does not indicate when he had been suspended, or that he was suspended during the recess of the Senate, which was the only time during which he could be legally suspended; nor do you inform me that any reasons for the suspension, such as the law then required, were submitted to the Senate. They took no action upon the nomination. A nomination of the same George W. Summers in place of Foster Blodgett, *removed*, appears to have been sent to the Senate on the 19th of February, 1869, upon which also no action seems to have been taken. Mr. Blodgett could not by law be removed from office during the term for which he was appointed and commissioned, except by the appointment of a successor, with the advice and consent of the Senate, or by a suspension such as the statute allowed. I do not understand that the action of the Postmaster-General in January, 1868, was during a recess of the Senate, and if it was not, the question of the power of suspension under the statute of 1867 does not arise, and Mr. Blodgett then held the office until his successor was qualified. As he continued to hold his office lawfully, therefore, between the 1st of January, 1868, and the 30th of March, 1869, and, so far as appears, was able, ready, and willing to perform his official duties, I think he was, and is, entitled to the compensation provided by law.

I return the papers submitted, and have the honor to be,
Very respectfully, your obedient servant,

E. R. HOAR.

Hon. J. A. J. CRESWELL,
Postmaster-General.

REINSTATING RETIRED ARMY OFFICERS.

An officer of the Army, who has been retired from active service in accordance with law, cannot be reinstated in his former place by an order of the President, though the vacancy caused by his retirement may not have been filled.

ATTORNEY-GENERAL'S OFFICE,

February 5, 1870.

SIR: In reply to your letter of the 3d instant, asking my

Forfeitures for Desertion.

opinion upon the question, "Where an officer of the Army, in accordance with law, has been retired from active service by order of the President, and the vacancy caused by such retirement has not been filled, can such officer be reinstated in his former position by an order of the President; or is such reinstatement to be made only by a new appointment, confirmed by the Senate?" I have the honor to say that I think he cannot. The reasons for this opinion seem to me to be sufficiently stated in an opinion which I gave to your predecessor, Hon. John A. Rawlins, under date of June 14, 1869, (*ante*, p. 99,) and in an opinion of Attorney-General Cushing, (8 Opins., 223.)

Very respectfully,

E. R. HOAR.

Hon. WILLIAM W. BELKNAP,

Secretary of War.

FORFEITURES FOR DESERTION.

There is no regulation, or statute, or principle of law, which renders forfeitable to the United States moneys belonging to soldiers found in their possession at the time of enlistment, and taken from them under a general order issued as a military police measure.

Such moneys, taken from enlisted men who are entered on the muster-rolls as deserters, but have never been convicted of desertion, are not payable to the board of managers of the National Asylum for Disabled Volunteer Soldiers, as moneys forfeited on account of desertion.

By enlisting or drafting a soldier, the United States acquire no right over his property not accruing to him in consideration of his enlistment or military service, and cannot rightfully deprive him of it permanently except as a punishment for crime.

The right to take money or other property from his possession while in the service which would be likely to interfere with the requirements of discipline, is entirely different in principle from the right wholly to divest him of it.

ATTORNEY-GENERAL'S OFFICE,
February 8, 1870.

SIR: The 5th section of the act of March 3, 1865, (13 Stat., 510,) and the 5th section of the act of March 21, 1866, in amendment thereof, (14 Stat., 10,) provide that for the establishment and support of the National Asylum for Dis-

Forfeitures for Desertion.

abled Volunteer Soldiers "there shall be appropriated all stoppages or fines adjudged against such officers and soldiers by sentence of court-martial or military commission, over and above the amounts necessary for the re-imbursement of the Government or of individuals, *all forfeitures on account of desertion from such service*, and all moneys due such deceased officers and soldiers which now are or may be unclaimed for three years after the death of such officers and soldiers, to be repaid upon the demand of the heirs or legal representatives of such deceased officers or soldiers."

Your letter of the 3d instant transmits a letter from the Second Comptroller to you of the 2d instant, in which he states that the Secretary of War, by General Order No. 305, dated December 27, 1864, directed that "When an enlisted man arrives at a draft rendezvous, any money he may have with him, exceeding twenty dollars, will be taken and placed in the hands of the paymaster, who shall enter the amount on a check-book to be given to the soldier at the time his money is taken." The order contains directions for the deposit, assignment, and payment of the money so taken, and also directs that, "in case of death or discharge, the money will be drawn from the Treasury in the same mode as other dues from the United States. In case of men charged with desertion, satisfactory proof must be produced either of pardon or of a removal of the charge, or that the soldier has served out his time and been properly discharged."

The Second Comptroller represents that a large amount of money is now in the Treasury of the United States, taken from enlisted men under this General Order, and that some of these men are entered as deserters upon the muster-rolls of their companies, although they have never been convicted of desertion by a court-martial. The board of managers of the asylum claim that so much of this money as was taken from enlisted men who are entered on the muster-rolls as deserters should be paid to them for the benefit of the asylum as money forfeited on account of desertion, and it is upon this question that you request my opinion.

Without considering whether the Secretary of War can by a general order, under any circumstances, lawfully take from a soldier money belonging to him when he enlisted and then

Forfeitures for Desertion.

found in his possession, and make it forfeitable to the United States by the subsequent acts of the soldier, it is enough to say that General Order No. 305 does not declare that the money so taken is to be forfeited by desertion. The order does require that, "in case of men charged with desertion, satisfactory proof must be produced either of pardon or of a removal of the charge, or that the soldier has served out his time and been properly discharged," before the money can be drawn from the Treasury; but this is not a declaration that the money is forfeited to the United States in case a man charged with desertion is not pardoned, or the charge of desertion is not removed, or the soldier does not serve out his time and receive properly a discharge.

The money received before or for enlistment by a soldier from other persons than the United States, belonging to him and found in his possession at the time of his enlistment, and taken from him under a general order issued as a military police regulation, cannot be regarded as comprehended in the words "pay and allowances" in paragraph 1358 of the Army Regulations, (1863,) and so is not forfeited under that paragraph; and I am not aware of any general regulation of the Army, or of any statute of the United States, or, in the absence of any such statute or general regulation, of any principle of law that renders such moneys forfeitable to the United States. I think they are not forfeited to the United States, and do not become payable to the board of managers of the asylum. By the enlistment of a man in the military service or drafting him into it, the United States acquire no right over his property not accruing to him in consideration of his enlistment or military service, and cannot rightfully permanently deprive him of it, except as a punishment for crime. The clear right to take money or other property from his possession while in the service which would be likely to interfere with the requirements of discipline, is entirely different in principle from the right wholly to divest him of it.

Whether the United States can lawfully retain such moneys so far as may be necessary to satisfy any indebtedness to the United States of the men from whom the moneys were taken, if any such exists, or can lawfully refuse to pay over such moneys to any agent of any such enlisted man while the entry

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of his desertion remains uncanceled on the muster-roll, and he is alive and refuses personally to present himself to be tried for desertion, if the United States wish to try him for that crime, are questions upon which my opinion is not requested.

Very respectfully, your obedient servant,

E. R. HOAR.

Hon. GEORGE S. BOUTWELL,

Secretary of the Treasury.

RECEIPTS FROM PRIVATE BONDED WAREHOUSES.

Section 40 of the act of July 18, 1866, in providing that "all moneys received by collectors for the custody of goods, wares, and merchandise in bonded warehouses shall be accounted for as storage under the provisions of the 5th section of the act of March 3, 1841," did no more than enact what was previously required by the regulations of the Treasury Department; and the provision is simply declaratory of the law as it existed at the date of its passage.

As to moneys received from the proprietors of private bonded warehouses, the rule as to accountability is the same, whether such moneys are paid as half storage or for the attendance of a customs officer at the premises, and whether they were received before the date of the act of 1866 or after.

ATTORNEY-GENERAL'S OFFICE,

February 14, 1870.

SIR : Your letter of April 30th last, acknowledging the receipt of an opinion given on the 27th of April last, relating to the right of collectors of customs to retain from the moneys received by them from importers for the reimbursement to the Government of the compensation of officers in charge of private bonded warehouses, a sum not exceeding \$2,000 per annum, under the 5th section of the act of March 3, 1841, (5 Stat., 432,) calls my attention to a doubt suggested in that opinion, whether the decision of the Supreme Court in the case of *The United States vs. Macdonald* (5 Wall., 647) could be regarded as a distinct adjudication upon this right of collectors in reference to such moneys received from the proprietors of private bonded warehouses independently of the effect of the 40th section of the act of July 18, 1866, (14 Stat., 188,)

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and you say that, "While, therefore, there is no further question in this regard connected with moneys accruing since the date of the act of 1866, yet, in order to a statement of outstanding claims prior to that date, it is necessary that I ask whether it is your opinion that a different rule should be observed in respect to such cases, which must, of course, be adjusted under the law as it existed before the act of 1866."

It is well known that warehousing, as a general system, was not established until after the passage of the act of August 6, 1846. The first regulations of the Department of the Treasury under this act confined the storage of merchandise, when placed under bond, to the public stores. Thus, in a circular issued by the Secretary of the Treasury on the 14th of August, 1846, for the information and government of the officers of customs in carrying the provisions of the act of 1846 into effect, the following directions were given: "All stores used for warehousing purposes are to be rented by the collector on public account, and paid for as such, and appropriated exclusively to the storage of foreign merchandise, which is to be subject to the usual rates of storage existing at the respective ports where such stores may be hired or rented;" and in a circular dated April 8, 1847, the Secretary reiterated the instructions theretofore given, that "all goods, whether stored under the warehousing act or under former laws, shall be stored in public stores hired by the collector or on account of the Government."

Under acts of Congress passed prior to the act of August 6, 1846, wherein provisions were made for warehousing certain merchandise, either in warehouses to be designated by the collector or in public or other store-houses, as might be agreed upon between the importer and surveyor or other public officer of the revenue, the Secretary of the Treasury, by a circular dated October 9, 1845, instructed the collectors of the principal ports that "where, at the instance and for the accommodation of merchants, goods may be allowed by the proper officers of the customs, in pursuance of law, to be deposited in other than the regular public stores, it is deemed but just and equitable that a charge of half storage should be exacted on all such goods, to reimburse the United States to some extent for the expense of hiring public stores, and

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in which the collector might insist on such goods being deposited, subject to the full charge of storage." At the date of this circular, there were but two descriptions of store-houses or warehouses known to the revenue laws, namely, public stores, which comprised store-houses owned by the Government or rented on public account, and other than public stores, which comprised store-houses not owned or rented by the Government, but which were required to be kept under the lock of an inspector of the customs as well as of the importer. By the warehousing circular of the 17th of February, 1849, the Secretary of the Treasury declared it to be the intention of the Department thereafter to use as bonded warehouses under the act of 1846, in addition to stores owned or leased by the United States, such private stores as were fully adapted to the purpose, disconnecting the Government as much as possible from any interference, not required by law or the public interests, with the business of storage, and leaving the same to be, as far as was lawful and practicable, a matter of arrangement between the importer of merchandise and the owner or occupants of such private warehouses. By this circular, all stores for the safe-keeping of dutiable merchandise under bond were designated bonded warehouses, and were divided into three classes. The first class embraced stores owned or leased by the United States, and therefore known as public stores. The second class included stores in the possession of the importer, which were to be placed under the customs lock in addition to the importer's lock, and were to be used solely for the purpose of storing the importations of the importer; while the third class comprised stores occupied by persons who desired to engage in the business of storing dutiable merchandise, which were also to be placed under the customs lock in addition to the locks of the proprietors. Upon goods deposited in stores of the first class, storage was required to be charged at the customary rate of the port. The proprietors of stores of the second class were required to pay monthly to the collector a sum equivalent to the pay of the inspector in attendance at any such store, or one-half of the amount which would accrue as storage on the goods stored therein at the regular rates charged at stores of the first class. The pro-

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prietors of stores of the third class were required to pay monthly a sum equivalent to the salary of the inspector in charge thereof, but were also allowed the option of paying half storage, as were the proprietors of the second class of warehouses. This circular also contained the following directions: "All moneys received by collectors from owners or occupants of private bonded stores in payment for half storage, or for the use of an inspector in attendance at the premises, will be accounted for as receipts for storage, in their accounts with the Department." The system established by this circular, which was issued pursuant to the 5th section of the act of 1846, was continued with some modifications by the warehousing act of March 28, 1854, (10 Stat., 270.)

The general regulations of the Treasury Department issued February 1, 1857, declared that all private stores employed for warehousing purposes should be placed under bond, and be thenceforth designated as bonded warehouses. These regulations adopted substantially the classification previously established, and required the proprietors of bonded warehouses of the second class to pay monthly to the collector of the port such sum as the latter might deem proper for the attendance of the customs officer, though not to be less than the pay of such officer; and a somewhat similar requirement was made in regard to proprietors of bonded warehouses of the third class. The alternative provision for the payment of half storage in the circular of February 17, 1849, was omitted in these general regulations. But the practice of receiving half storage in lieu of an amount equivalent to the pay of the customs officer in attendance appears not to have been discontinued, since the Secretary of the Treasury, under date of June 30, 1857, directs that "in cases where goods are stored under bond in a private store, the importer shall either make monthly payments of a sum equivalent to the pay of the inspector placed in charge of the same, or one-half of the amount which would accrue as storage on the goods so stored if placed in public stores, the importer to make his selection at the time of placing his goods in store." (*Clark et al. vs. Peaslee*, 1 Clifford, 545.)

It would seem, then, that the moneys received by the col-

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lectors for the custody of dutiable merchandise prior to the act of 1866, whether goods were deposited in public stores or in other than public stores, or in bonded warehouses, and whether they were received as full storage or half storage, or for the pay of the customs officer in attendance at the storehouse, have been from time to time, since the act of 1846, regarded by the Department of the Treasury as substantially of the same general character, and that by regulations of the Department the collectors have been required to account for all moneys so received under the same general head, namely, as receipts for storage; so that in point of fact the act of 1866, by declaring that "all moneys received by collectors for the custody of goods, wares, and merchandise, in bonded warehouses, shall be accounted for as storage under the provisions of the 5th section of the act of March 3, 1841," did no more than enact what was previously required by the regulations of the Department, and this provision must be taken as declaratory of the law as it existed at the date of its passage.

In the case of *The United States vs. Macdonald*, (5 Wall., 647,) the action was debt on the official bond of the collector of customs at Portland, Maine; the plea was performance; the replication was that, by the statement of the accounts at the Treasury Department, the defendant had received a certain sum which belonged to the plaintiffs, and which he had neglected and refused to pay into the Treasury; the rejoinder was that the sum specified was received and accounted for quarter-yearly, and retained by virtue of his office as collector for storage of merchandise in bonded warehouses from January 20, 1858, to April 18, 1861, inclusive, but not more than \$2,000 in any one year; to which there was a demurrer by plaintiffs, and joinder. The demurrer was overruled and judgment rendered for the defendant. The opinion of the circuit court is found in 26 Law Reporter, p. 558. The only question raised by the pleadings was, whether the defendant had a right to retain out of his receipts for storage of merchandise in bonded warehouses from January 20, 1858, to April 18, 1861, inclusive, a sum not exceeding \$2,000 per annum. It is not distinctly stated whether the moneys so received from the proprietors of bonded warehouses were

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moneys received as half storage, or as pay for the attendance of an officer. But they must have been either one or the other; and if the practice at Portland was in accordance with the general regulations of 1857, the moneys must have been of the latter description; if in accordance with the Secretary's letter of June, 1857, the moneys might have been of either or of both; but it is improbable that, if it had seemed to the court that there was any distinction between these two descriptions of moneys so received in reference to the right of the collector to retain out of them a sum not exceeding \$2,000 per annum, it would not have been noticed by the court. It was distinctly decided by the court that moneys received from the proprietors of private bonded warehouses were in the same predicament in this respect as the storage received for merchandise stored in warehouses leased to the Government, beyond the rent paid to the collector.

I cannot think that any different rule should be established in regard to such moneys when received by a collector as pay for the attendance of an officer at the premises, than for moneys paid as half storage, or that a different rule should be applied to such moneys received before the passage of the act of 1866, from that which I considered applicable thereto since its passage.

Very respectfully, your obedient servant,

E. R. HOAR.

Hon. GEORGE S. BOUTWELL,

Secretary of the Treasury.

ADJUSTMENT OF INDIANA WAR CLAIMS.

Duties of the accounting officers of the Treasury as to the auditing of the accounts of the State of Indiana, under the provisions of the act of March 29, 1867, to reimburse that State for moneys expended in enrolling and equipping troops to aid in suppressing the rebellion, defined.

ATTORNEY-GENERAL'S OFFICE,

February 19, 1870.

SIR: I have received and considered your letter of the 4th of February instant, in which you inclose a communication from the Acting Third Auditor and Second Comptroller,

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relating to a claim made by the State of Indiana for money expended in enrolling and equipping troops called into service by the State during the rebellion, and submit for my opinion "whether it is the duty of the accounting officers of the Treasury Department to accept the report of the commissioners, or whether the auditing officers are to examine the vouchers and evidence of indebtedness, as in other cases of claims against the Government." The question arises upon the proper construction of the act of March 29, 1867, (15 Stat., 9,) and I have been favored with the arguments and views of the counsel of the State of Indiana upon the subject.

The claim on behalf of the State is that, by the 5th section of the statute the commissioners are to make up the account and ascertain the balance, and make a written report thereof to the Secretary of the Treasury, who shall cause the same to be examined by the proper accounting officers of the Treasury, and said officers shall audit the said account as in ordinary cases, and if from said report it shall appear that any sum remains due to the said State, he shall draw his warrant for the same, payable to the governor of the State, and deliver it to him; and that it follows from this provision that the amount found due by the commissioners in their report is conclusive upon the accounting officers and the Secretary of the Treasury. I think the last clause of the 5th section of the statute should be construed as if it read, "and if from said report, *thus examined and audited*, it shall appear," &c. If the report of the commissioners were intended to be conclusive in all respects, there would be no apparent object in submitting their report to be audited and examined as in ordinary cases. I think the view which has been taken by the accounting-officers of the Treasury in the paper which you inclose, is substantially correct, and that the auditing officers have the right and duty to ascertain and determine, as they say they understand their duty to be—

"1st. Whether any errors in computation have been made in any voucher or abstract, which may have escaped the notice of the commissioners;

"2d. Whether the 'rate of any expenditure or compensation for services' allowed by the commissioners was greater than that authorized at the time 'by the laws of the United States or the Department regulations in similar cases;'

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"3d. Whether any errors appear in the footings of the account as presented by the commissioners;

"4th. Whether any claims for services rendered or expenses incurred subject to August 20, 1866, on account of troops mustered into or employed in the service of the United States have been paid, the Second Comptroller having decided that such expenditures must be disallowed."

The fifth subject of examination which they propose, namely, "Whether the accounts claimed to have been paid by the State are properly receipted as required by Rule 4 for settlement of claims for re-imbursement of expenses incurred by the several States," I do not think, under the peculiar provisions of the statute, is intrusted to them. By the 2d section of the statute, not only disbursements made, but amounts assumed, by the States, are to be allowed; and, therefore, the requirement of receipts or vouchers for payment would seem to be unauthorized.

The design of this statute seems to me clearly to be to provide, through the means of commissions, for ascertaining the facts in the case; and their report upon the facts I understand to be conclusive and binding upon the accounting officers in the Treasury Department, and to be taken by them as a substitute for the vouchers or proofs required in ordinary claims against the Government where no commissioners have intervened. This gives full effect to the office of the commissioners, and as much effect as would seem to be consistent with the provision in the statute that their report is to be submitted to the auditing officers. When thus submitted, although the facts found are to be taken as true, yet errors of computation, if any, are to be corrected, and the accounting officers are to ascertain whether any of the sums reported as disbursed or assumed by the State are for purposes not authorized by the law.

The communication from the Acting Third Auditor and Second Comptroller is herewith returned.

Very respectfully, your obedient servant,

E. R. HOAR.

Hon. GEO. S. BOUTWELL,
Secretary of the Treasury.

Tenure of Office Acts.—Reinstating Suspended Officer.

TENURE OF OFFICE ACTS.—REINSTATING SUSPENDED OFFICER.

Consistently with the spirit and purpose of the tenure of office acts of March 2, 1867, and April 5, 1869, the President may revoke the suspension of an officer and reinstate him in the functions of his office, after the rejection by the Senate of a nomination to fill his place.

The word *suspended*, as used in those acts, imports that the person suspended is still the incumbent of the office, and that the interruption of his performance of its duties is temporary and provisional.

The effect of revoking the suspension is only to restore to his former condition the actual possessor of the office, to whose removal the Senate has given no advice or consent.

ATTORNEY-GENERAL'S OFFICE,

April 2, 1870.

SIR: I have had the honor to receive the paper transmitted to you by the Commissioner of Internal Revenue with a request that the opinion of the Attorney-General should be obtained upon the question of "the power of the President to restore a suspended civil officer to duty after making a nomination to the Senate of a person to fill his place, and after that nomination has been neglected by the Senate," which was sent to me on the 15th of March last for the purpose of obtaining such an opinion.

The question is one of great difficulty, because the precise case stated therein does not seem to have been in the contemplation of Congress in framing the statute upon which an answer to it depends. By the act of April 5, 1869, it is provided "that every person holding any civil office to which he has been or hereafter may be appointed, by and with the advice and consent of the Senate, and who shall have become duly qualified to act therein, shall be entitled to hold such office during the term for which he shall have been appointed, unless sooner removed, by and with the advice and consent of the Senate, or by the appointment, with the like advice and consent, of a successor in his place, except as herein otherwise provided."

The 2d section of the statute provides "that during any recess of the Senate the President is hereby empowered, in his discretion, to suspend any civil officer appointed by and

Tenure of Office Acts.—Reinstating Suspended Officer.

with the advice and consent of the Senate, except judges of the United States courts, until the end of the next session of the Senate, and to designate some suitable person, subject to be removed in his discretion by the designation of another, to perform the duties of such suspended officer in the mean time; * * * and it shall be the duty of the President, within thirty days after the commencement of each session of the Senate, except for any office which in his opinion ought not to be filled, to nominate persons to fill all vacancies in office which existed at the meeting of the Senate, whether temporarily filled or not, and also in the place of all officers suspended; and if the Senate during such session shall refuse to advise and consent to an appointment in the place of any suspended officer, then, and not otherwise, the President shall nominate another person as soon as practicable to said session of the Senate for said office."

I think the manifest purpose of this statute was to restrict the unqualified power of removal from office without the concurrence of the Senate.

The statute of March 2, 1867, of which the statute of 1869 is an amendment, provided more expressly for the continuance in office of a person whom the President was authorized to suspend, unless a successor should be appointed with the advice and consent of the Senate; but I can see in neither statute sufficient evidence of an intention that an officer once appointed by the President, with the advice and consent of the Senate, and suspended from office by the President in his discretion, should not be allowed to resume the functions of his office whenever, in the discretion of the President, the cause for his suspension was at an end, unless his tenure of office had been absolutely terminated and extinguished by the appointment and confirmation of a successor.

The 2d section of the act of 1867, which is now repealed, provided in express terms that the President, in case he should become satisfied that such suspension was made on insufficient grounds, should be authorized, at any time before reporting such suspension to the Senate, to revoke such suspension, and reinstate such officer in the performance of the duties of his office. There was no express provision even in

Tenure of Office Acts.—Reinstating Suspended Officer.

that act that he might not revoke a suspension and reinstate the officer after a new nomination had been made to the Senate. Probably the question whether such a case would arise and the President would desire to reinstate a suspended officer after a nomination had been made to the Senate, and while it was waiting their action, did not occur to the framers of the statute. But, as it is in the power of the President to withdraw a nomination which he has made before it is acted upon, and to send in a different nomination, and as there seems, in the reason of the thing, nothing of public interest involved in the question whether revoking a suspension should be made at one time or another, if no action had been taken by the Senate confirming a successor, I think it is in the power of the President to reinstate a suspended officer under the circumstances included in the statement of the Commissioner of Internal Revenue.

The word *suspended* imports that the person suspended is still the incumbent of the office; that the interruption of his performance of its duties is temporary and provisional; and if, before the office is otherwise filled, the President comes to the conclusion that the reasons of the suspension no longer exist, the effect of revoking it is only to restore the actual possessor of the office who has been confirmed by the Senate, and to whose removal they have given no advice or consent, to his former condition.

The President, in the case upon which my opinion is asked, has, in effect, asked the concurrence of the Senate in the removal of the officer suspended by the appointment of another, and the Senate have refused to concur. Their whole action upon that proceeding is thus terminated, and I am of the opinion that the President has the same legal right and authority to revoke the suspension and to restore the officer before making another nomination, as he would have had if he had made no nomination whatever; and this construction of the law is most consistent with the spirit and purpose of the statute and with the due exercise of the constitutional powers of the President.

Very respectfully,

E. R. HOAR.

The PRESIDENT.

Existence of Statutes—Proof of.

EXISTENCE OF STATUTES—PROOF OF.

The Secretary of the Interior is not concluded in his action as to the issue of certain land scrip by what purports to be an authenticated copy of an act of the State of Florida of the 19th of February, 1870, but may inquire whether or not such an act was passed by the legislature of the State and has become a law.

A paper purporting to be a duly authenticated copy, or an exemplification, of a statute of a State under the seal of the State, is *prima-facie* evidence of the existence of such statute; and, in the absence of anything to the contrary, would justify the Secretary in acting upon it.

But when evidence is exhibited or suggestions made that there is no such statute, or that it was not passed according to the forms of law, he has a right, and it is his duty, so far as he is called upon to act in reference to the existence or validity of such a statute, to inquire and determine what the facts in those respects are.

ATTORNEY-GENERAL'S OFFICE,
April 30, 1870.

SIR: I have received your letter of the 26th instant, in which you say that "the State of Florida is entitled to certain scrip by virtue of an act of Congress entitled 'An act donating public lands to the several States and Territories which may provide colleges for the benefit of agriculture and mechanic arts,' approved July 2, 1862, and the acts amendatory thereof and supplementary thereto, upon her complying with the terms and conditions specified in said acts.

"On the 30th day of January, 1869, the State passed a joint resolution, which, it is claimed, authorized the superintendent of public instruction to receive from the United States said scrip. I have been notified that on the 19th day of February last the State passed an act authorizing the governor to ask for and receive from the United States the scrip, and repealing all parts of laws conflicting with said act.

"I transmit you herewith a copy of a letter received from the superintendent of public instruction, bearing date February 26, 1870. I have the honor to request your opinion, whether, under the circumstances, a duly authenticated copy of said act, filed in this Department, should conclude my action in the issue and delivery of the scrip, or whether it is my duty to investigate the alleged facts mentioned in said

Existence of Statutes—Proof of.

letter, which, in the opinion of the superintendent, implicate the validity of said act."

The letter of the superintendent of public instruction, to which you refer, alleges that the act to authorize the governor to ask for and receive the agricultural land-scrip from the United States is, in the opinion of the attorney-general of the State of Florida, no law; that it is a fraudulent document; that no act by that title passed either house of the legislature of the State at its recent session, as pretended; that this is manifest from the journals of both houses; and that the person who enrolled the fraudulent instrument has confessed his act.

In *Gardner vs. The Collector*, (6 Wall., 499, 511,) the Supreme Court of the United States say: "We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule."

I am, then, of opinion that you are not concluded in your action in reference to the issue of the scrip mentioned, by what purports to be an authenticated copy of an act of the State of Florida of the 19th of February, 1870; but that you have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind an answer to the question, whether or not such an act was passed by the legislature of Florida, and has become a law. A paper purporting to be a duly authenticated copy or an exemplification of a statute of a State, under the seal of the State, is *prima-facie* evidence that a statute has been passed, and in the absence of any evidence or suggestion to the contrary would justify you in acting upon it; but when evidence is exhibited or suggestions made that there is no such statute, or that it was not passed according to the forms of law, you have a right, and it is your duty, so far as you are called upon to act in reference to the existence or validity of such a

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statute, to inquire and determine what the facts in those respects are.

Very respectfully,

E. R. HOAR.

Hon. J. D. Cox,

Secretary of the Interior.

PAYMENT FOR MAIL-SERVICE.

The facts stated in this case showing that a certain sum was due to a mail-contractor under his contract, which, by mistake and misapprehension, the Department has paid to another: *Advised* that the contractor, notwithstanding such payment, is entitled to the money due under his contract, and accordingly that, if there is any fund in the hands of the Postmaster-General available for the purpose, the latter should pay it.

If, however, the case, upon the same state of facts, has already been considered and finally decided by any of that officer's predecessors, it would fall within the principle that the final decision of a case before a head of Department is binding upon his successors in the same Department.

ATTORNEY-GENERAL'S OFFICE,
May 5, 1870.

SIR: I have the honor to acknowledge the receipt of your letter of the 26th of April, 1870, asking my opinion as to your power and duty to make a payment to George Chorpening under the circumstances set forth in your letter, as follows:

"George Chorpening was contractor for carrying the mails in 1858-'59 and '60, from Placerville, California, to Salt Lake City, Utah.

"On the allegation that the contractor had failed, or was about to fail, in the performance of the service, the postmaster at Placerville employed Lewis Brady to convey the mails two trips on the whole route, and on half the distance for about four months in 1859 and 1860. For this service Brady was paid at the rates agreed upon by the postmaster, the sum of \$8,333, which was charged, by order of the then Postmaster-General, Mr. Holt, to the account of contractor Chorpening, having the effect to reduce his compensation by that amount.

"It is now contended by the contractor and his counsel

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that no failures occurred ; that there was no occasion for the engagement of this temporary service ; that this sum was unjustly charged to him, and its return is claimed.

"The evidence submitted is such as to satisfy me that the claim is just, and that the money should be refunded ; but the question arises, have I the power to order payment of this sum a second time ? In other words, can two parties be paid for the same service without the previous sanction of Congress by the reappropriation of funds for the purpose, or other legislative action ?

"It should be stated that this payment was made not from a special appropriation for this object, but from the general annual appropriation for the transportation of the mails."

I am of opinion that you have the power, and that it is your duty, under those circumstances, to pay the amount. The facts you state show that the sum was due to the contractor under his contract, and that, by mistake and misapprehension, the Department has paid to another person money for services which was due to Chorpening. The payment to the other was the error, and cannot, that I can perceive, invalidate in any manner the claim of Chorpening to receive the money to which he is entitled under his contract. It being, therefore, a just claim against the United States, to be paid by your Department, the only question that can arise is, whether there is any appropriation within your control out of which it can be paid. The general appropriation for transportation, if large enough, I understand to be subject to your disposal for the purpose of discharging all valid contracts for transportation. That a part of the fund has been previously misapplied cannot, I think, affect your duty in this particular. If money has been paid improperly in a previous year, and under such circumstances that it cannot be recovered back, it might be a ground for an additional appropriation by Congress in a deficiency bill or otherwise, so as to leave the entire sum applicable to transportation at your command for the requirements of the present year ; but this is a matter involving considerations of general convenience and supply. As far as Chorpening is concerned, I think upon the facts you state that he is entitled to his money, and, if there is any fund in your hands out of which it can be paid, that payment should be made accordingly.

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It is proper, however, that I should add, that I do not understand that the title of Chorpening to this money has ever been considered and decided by any of your predecessors, so that the case, after hearing on both sides, has ever been the subject of adjudication in your Department. If that fact were otherwise, it would fall within the principle that the final decision of a case before a head of a Department is binding upon his successors in the same Department, unless where there has been a palpable error of calculation or new facts are subsequently discovered which show that the former decision was erroneous, and would not have been made if they had been seasonably known. See the case of *The United States vs. Bank of the Metropolis*, (15 Peters, 400,) and the opinion of Attorney-General Stanbery in the Chorpening case, (12 Opins., 355.)

Very respectfully,

E. R. HOAR.

Hon. J. A. J. CRESWELL,
Postmaster-General.

INFORMERS' SHARES UNDER THE INTERNAL-REVENUE LAWS.

Internal-revenue officers are not excluded from claiming and receiving informers' shares.

The provisions of the 179th section of the act of June 30, 1864, as amended by the act of July 13, 1866, relating to such shares, are expressly applicable only to cases not otherwise provided for; but where it is not otherwise provided for, they are applicable, whether the fine, penalty, or forfeiture is recovered or is recoverable by indictment, or information, or action of debt.

The form of the prosecution is immaterial in respect to the rights of any person claiming as informer; and under the statutes now (May, 1870) in force, the fact that a fine or penalty can be recovered only by indictment is no objection to the claim of any person to be declared informer.

The statute does not state to whom the first information must be given in order to entitle the person giving it to be declared informer; but the intention is that it should be given to the United States; that is, to some person representing the United States for the purpose of administering the internal-revenue laws.

A communication, however, from one revenue officer to another, or from a revenue officer to a United States attorney, or vice versa, is not *first informing* within the meaning of the statute.

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Internal-revenue officers, who by law are authorized to enter and inspect buildings and places used for certain purposes, may become entitled to share as informers, if in the performance of such service they first discover the cause, matter, or thing, whereby a fine, penalty, or forfeiture has been incurred.

Whether a subordinate officer, acting under the instructions of his official superior, is in such case to be regarded as an informer in consequence of what he discovers while so acting, depends upon how far his discoveries were the result of his own exertion and skill, and how far they were the result of the instructions given him.

The right of an internal-revenue officer to be declared an informer in any case does not depend upon the particular office he holds, but upon what he himself has discovered and done to insure the recovery of any fine, penalty, or forfeiture, or the payment of moneys in lieu thereof.

Detectives whom the Commissioner of Internal-Revenue is authorized to employ by the 50th section of the act of July 20, 1868, are not internal-revenue officers.

ATTORNEY-GENERAL'S OFFICE,
May 13, 1870.

SIR : I have considered the following questions submitted to me by you for an opinion :

“ 1. Are internal-revenue officers whose duty it is to detect frauds entitled to informers' shares for the communication of facts of which the knowledge is acquired while in the discharge of that duty ?

“ 2. If not, are such officers entitled to informers' shares for information obtained while not in the direct prosecution or course of duty ?

“ 3. Are collectors and assessors of internal-revenue, their deputies and assistants, or either of them, debarred from sharing as informers ; and if so, under what circumstances ?

“ 4. Are the inspectors of spirits, or of tobacco, snuff, and cigars, authorized by section 58 of the act of June 30, 1864, debarred from receiving informers' shares for information communicated by them ?

“ 5. Is any one entitled to share as informer in the proceeds of a fine obtained through an indictment for violation of the internal-revenue law ?”

Your letter states that the Department of the Treasury “ has invariably recognized the right of any internal-revenue officer from whom the information was received, to an informer's share ;” that “ this construction was believed to be

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justified, not only by the absence of any limitation in section 179 of the act of June 30, 1864, but by the provisions of section 41 of that law ; by the decision of Judge Ware in the case of *Hooper et al. vs. Fifty-one Casks of Brandy*, Davies's Rep., p. 370, and by the indorsement of that decision by Mr. Attorney-General Black, in 9 Opinions of Attorneys-General, p. 400 ;" and that "the Department is not informed that, until quite recently, any decision adverse to this doctrine had been made by any of the United States judges, who have the duty of distributing these shares in cases where fines or penalties have been imposed, or forfeitures declared by the judgments or decrees of courts."

You call my attention to the decisions of Judge Lowell, of the district court of the United States for the district of Massachusetts, in *The United States vs. One Hundred Barrels of Distilled Spirits*, and in *The United States vs. Thirty-four Barrels of Distilled Spirits*, Sanderson claimant, found reported in vol. 8 Internal Revenue Record, p. 20, and vol. 9 ibid., p. 169, and the decision of Judge Blatchford, of the district court of the United States for the southern district of New York, in *The United States vs. Four Cutting-Machines*, found reported in vol. 9 Internal Revenue Record, p. 145, and to what is said to have been a decision of Judge Hall, of the district court of the United States for the northern district of New York, to the effect that no person is entitled, as informer, to any share of a fine imposed by a court as the sentence of a person found guilty on an indictment of an offense against the internal-revenue laws.

The earliest provisions in the internal-revenue laws of the United States, on the subject of informers' shares, were the 44th section of the act of March 3, 1791, (1 Stat., 209;) the 10th section of the act of June 5, 1794, (1 Stat., 375;) the 21st section of the act of June 5, 1794, (1 Stat., 389;) the 12th section of the act of June 9, 1794, (1 Stat., 400;) the 14th section of the act of March 3, 1795, (1 Stat., 429;) and the 20th section of the act of July 6, 1797, (1 Stat., 532.)

Under these provisions one-half of these fines, penalties, and forfeitures recovered, was, in general, to be paid to the person or persons who made the seizure or who first discovered the cause, matter, or thing whereby the fines, penalties, or

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forfeitures had been incurred, or the person who, if an officer of inspection, first discovered, or, if other than an officer of inspection, first informed of the cause, matter, or thing whereby such fine, penalty, or forfeiture had been incurred.

The next provisions of this kind in the internal-revenue laws were the 10th section of the act of July 24, 1813, (3 Stat., 47;) the 13th section of the act of August 2, 1813, (3 Stat., 80;) the 21st section of the act of December 21, 1814, (3 Stat., 157;) the 21st section of the act of January 18, 1815, (3 Stat., 185;) 24th section of the act of January 18, 1815, (3 Stat., 191;) and the 14th section of the act of April 19, 1816, (3 Stat., 294.)

These sections made it the duty of the collectors in their respective districts not only to collect the duties imposed by the acts respectively, but to prosecute for the recovery of sums forfeited, &c.; and they all provided that all fines, penalties, and forfeitures incurred by force of these acts should and might be sued for and recovered either in the name of the United States or of the collector within whose district such fine, penalty, or forfeiture had been incurred, by bill, plaint, or information, one moiety thereof to the use of the United States and the other moiety thereof to the use of the person who, if a collector, should first discover, or if other than a collector, should first inform of the cause, matter, or thing whereby any such fine, penalty, or forfeiture had been incurred, except that the 14th section of the act of April 19, 1816, required that the fines, penalties, and forfeitures imposed by that act should be sued for and recovered in the name of the United States, and did not permit them to be sued for in the name of the collector; and also provided that, if the violation of the act for which such fine, penalty, or forfeiture had been incurred could not be established without the testimony of such collector or other informant, then the whole of such fine, penalty, or forfeiture should be for the use of the United States.

The next legislative provision on the subject was the 54th section of the act of August 5, 1861, (12 Stat., 312,) which made it the duty of the collector to prosecute for the recovery of sums forfeited, and enacted that "all fines, penalties, and forfeitures which shall be incurred by force of this act, shall

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and may be sued for and recovered in the name of the United States or of the collector," &c., one moiety thereof to the use of the United States and the other moiety thereof to the use of such collector.

The 31st section of the act of July 1, 1862, (12 Stat., 444,) had the same general provisions in regard to prosecution as the said 54th section; and it also enacted that "where not otherwise and differently provided, one moiety thereof shall be to the use of the United States, and the other moiety thereof to the use of the person who, if a collector or deputy-collector, shall first inform of the cause, matter, or thing whereby any such fine, penalty, or forfeiture was incurred." The 59th section of the same act provided that a moiety of the penalty imposed by that section should be "to the use of the person who, if a collector, shall first discover, and, if other than a collector, shall first give information of the fact whereby said forfeiture was incurred."

The 41st section of the act of June 30, 1864, (13 Stat., 239,) provided that suits for fines, penalties, and forfeitures must be in the name of the United States, and that "where not otherwise and differently provided for, one moiety thereof shall be for the use of the United States, and the other moiety thereof to the use of the person, to be ascertained by the judgment of the court, who shall first inform of the cause, matter, or thing whereby any such fine, penalty, or forfeiture was incurred, provided that, in case of any suit brought upon information received from any person other than a collector, deputy-collector, assessor, assistant assessor, or inspector of internal revenue, the United States shall not be subject to any costs of suit, nor shall the fees of any attorney or counsel employed by any such officer be allowed in the settlement of his account, unless," &c.

The 179th section of the same act (13 Stat., 305) enacted, that "where not otherwise herein provided for, one moiety shall be to the use of the person who, if a collector or deputy-collector, shall first inform of the cause, matter, or thing," &c.; but the words "if a collector or deputy-collector" were stricken out by the 1st section of the amendatory act of March 3, 1865, (13 Stat., 483,) which amendment also provided that "where any penalty is paid without suit or before

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judgment, and a moiety of the same is claimed by any person as informer, the Secretary of the Treasury on application to him, under such regulations as he shall prescribe, shall determine whether any claimant is entitled to such moiety, and to whom the same shall be paid."

There were also special provisions in respect to informers' shares in the 21st, 36th, and 73d sections of the act of June 30, 1864. The 41st and 179th sections of the act of June 30, 1864, were amended by the act of July 13, 1866, (14 Stat., 111, 145.) The effect of the amendment of the 41st section was to strike out all in that section relating to informers' shares, and to leave that subject to be regulated by the provisions of the amendment of the 179th section, when it was not otherwise provided. This amendment to the 179th section, now in force, after making it the duty of collectors to prosecute for the recovery of any sum or sums that may be forfeited, and providing that "all fines, penalties, or forfeitures which may be imposed or incurred shall and may be sued for and recovered, when not otherwise provided for, in the name of the United States, in any proper form of action or by any appropriate form of proceeding," &c., enacts that "where not otherwise provided for, such share as the Secretary of the Treasury shall by general regulations provide, not exceeding one moiety, nor more than five thousand dollars in any one case, shall be to the use of the person, to be ascertained by the court which shall have imposed or decreed any such fine, penalty, or forfeiture, who shall first inform of the cause, matter, or thing whereby such fine, penalty, or forfeiture shall have been incurred, and when any sum is paid without suit or before judgment in lieu of any fine, penalty, or forfeiture, and a share of the same is claimed by any person as informer, the Secretary of the Treasury, under general regulations to be by him prescribed, shall determine whether any claimant is entitled to such share as above limited, and to whom the same shall be paid," &c.; with a provision declaring the meaning of that and the previous acts in regard to the time when the rights of informers in any case vest, and a further provision authorizing the compromise of any case arising under the internal-revenue laws, whether pending in court or otherwise; and a still further provision that

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when in a civil action for a penalty, the informer is a witness for the prosecution, the party against whom the penalty is claimed may be admitted as a witness in his own behalf.

The legislative history of this amendment of the 179th section, so far as it concerns the subject-matter under examination, is as follows: The bill, having been reported to the House of Representatives by the Committee of Ways and Means, was considered in Committee of the Whole, and the amendment of section of 179, as reported by the Committee of Ways and Means, provided "that no collector, deputy collector, assessor, assistant assessor, revenue-agent, revenue-inspector, or other officer or person connected with the Treasury Department, or any of the branches thereof, shall be entitled to or receive, or shall be interested in, any share allowed to an informer under the internal-revenue-laws." (Vol. 71, Congl. Globe, pt. 3, first sess. 39th Congress, p. 2811.) This provision, excluding these persons from receiving any share as informers, was applicable to sums recovered by the judgment of a court, as well as those paid without suit or before judgment, or in compromise of cases arising under the internal-revenue laws. This provision was amended in Committee of the Whole, by striking it out and inserting in lieu thereof the following: "that no revenue-officer or other person connected with, or in the employment of, the Treasury Department or any branch thereof, shall be entitled to receive or shall be interested in any share allowed to an informer under the internal-revenue laws, in any case with which such revenue-officer or other person as aforesaid shall be hereafter in any manner officially connected, unless such share shall be recovered by the judgment of a court of competent jurisdiction." (*Ibid.*, p. 2811.) The bill as amended passed the House, and was sent to the Senate; and when sent to the Senate contained the provision last cited. In the Senate the bill was referred to the Committee on Finance, who reported it back with amendments, one of which was to strike out the provision last cited, with others, and to insert in lieu thereof certain words now found in the statute. (Congl. Globe, vol. 72, part 4, first session 39th Congress, p. 3324.)

It thus appears that the Department of the Treasury up to the time the act of July 13, 1866, was passed, had uniformly

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held that internal-revenue officers were, in proper circumstances, entitled to receive informers' shares; that by a report of the Committee of Ways and Means of the House of Representatives, the attention of the House was expressly called to the question whether such officers should or should not be in all cases excluded; that the committee reported in favor of excluding them in all cases; that the House of Representatives rejected this provision, and adopted a provision prohibiting revenue officers or other persons connected with or in the employ of the Department, in certain cases, from receiving or being interested in any informer's share, unless such share should be recovered by the judgment of a court; that in this form the bill was sent to the Senate; that the Senate struck out the modified prohibition made by the House, leaving no express prohibition whatever; and in this form the bill, so far as this section is concerned, passed to be enacted.

It also appears that from the beginning of congressional legislation on the subject, revenue-officers have been held entitled to receive informers' shares; that in the early statutes relating to internal revenue, informers' shares were given to certain officers of the internal-revenue service if they first discovered, and to other officers and persons if they first informed, of the cause, &c.; that by the 54th section of the act of August 5, 1861, one moiety of the amount recovered was for the use of the collector, no other person being entitled to receive any part of the sum recovered; and that by the 31st section of the act of July 1, 1862, only a collector or deputy collector was entitled to any part of the amount recovered, and they were entitled, if they first informed, &c., to a moiety thereof.

A comparison of these provisions in the internal-revenue laws with corresponding provisions in the custom-revenue laws confirms the opinion that it was not intended to exclude internal-revenue officers from receiving informers' shares. See the 38th section of the act of July 31, 1789, (1 Stat., 48;) the 69th section of the act of August 4, 1790, (1 Stat., 177;) the 91st section of the act of March 2, 1799, (1 Stat., 697;) the 2d section of the act of February 28, 1865, (13 Stat., 442,) and the 1st section of the act of March 2, 1867, (14 Stat., 546.)

It is, therefore, manifest that internal-revenue officers are

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not to be excluded from claiming and receiving informers' shares. The question, then, is, under what circumstances are they to be considered the persons who first inform of the cause, matter, or thing whereby the fine, penalty, or forfeiture has been incurred, within the meaning of the 179th section of the act of June 30, 1864, as amended?

Under the internal-revenue laws now in force, all prosecutions for fines, penalties, or forfeitures must be in the name of the United States, and may be by any proper form of action or appropriate form of proceeding, which, under the various provisions imposing fines, penalties, and forfeitures, is either by indictment or information, or a civil action of debt. These are to be instituted and prosecuted by the United States attorney for the district in which they are brought; and the first information the court judicially has that any fine, penalty, or forfeiture has been incurred, in case the prosecution is by indictment, is when a presentment is made by the grand jury; and, in case the prosecution is by information or action of debt, is when the information is filed or the writ sued out or entered in the clerk's office of the court. The grand jury get their information from witnesses who may voluntarily appear or may be compelled to appear before them to testify. The United States attorney may get his information from what he has himself discovered, or from what has come to his knowledge from the examination of witnesses before magistrates, grand juries, and courts, or from what has been voluntarily communicated to him by other persons.

It is the duty of a collector of internal revenue to prosecute for the recovery of all sums forfeited; and whenever he discovers, or is informed by other persons, that a fine, penalty, or forfeiture has been incurred, it is his duty to request the United States attorney to institute the appropriate legal proceedings. In cases of forfeiture of specific property, it is the duty of the collector first to make a seizure, and then to request the district attorney to file an information against the property, although the seizure by any other person, if ratified by the United States through their officers, is valid. Supervisors and assessors of internal revenue have, in certain cases, by statute, a right to summon persons before them,

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and to examine them under oath, and to compel the production of their books and papers; and revenue-officers generally have a right to enter buildings used for certain purposes, and to make an examination thereof for the purpose of detecting violations of the internal-revenue laws; and subordinate revenue-officers may be directed by their official superiors to perform specific duties, and in the performance of these duties may discover evidence that fines, penalties, and forfeitures have been incurred. The evidence thus discovered, or the information thus obtained, may result in the payment without suit or before judgment, or as a compromise, of money in lieu of a fine, penalty, or forfeiture, which the evidence shows, or tends to show, has been incurred; and the Secretary of the Treasury must then determine whether any person is entitled to a share thereof as an informer. It is only when a court imposes or decrees a fine, penalty, or forfeiture, that the person to whom the informer's share is payable must be ascertained by the court.

The provision of the 179th section as amended, relating to informers' shares, is expressly applicable only to cases not otherwise provided for; but where it is not otherwise provided it seems to me applicable, whether the fine, penalty, or forfeiture is recovered or is recoverable by indictment or information or action of debt. Wherever there are special provisions they of course must be followed. (See opinion of Attorney-General Evarts, 12 Opins., p. 558.)

The opinion of Attorney-General Bates (11 Opins., 62) was given in reference to the application of the distributing clause of the 31st section of the act of July 1, 1862, (12 Stat., 444,) to the fine imposed by the court upon conviction on an indictment under the 9th section of the same act. The reasoning of Mr. Bates seems to be that the language of the said 31st section confines moiety given therein to such fines, penalties, and forfeitures as may be sued for and recovered either in the name of the United States or of the collector, that is sued for and recovered either by information or a penal action, and that the proceeding under the said 9th section by indictment is under a special and different provision from that made in the 31st section. The law has since been changed, particularly in the provision permitting fines, pen-

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alties, and forfeitures to be sued for and recovered, either in the name of the United States or of the collector. They must now all be sued for and recovered, where it is not otherwise provided, in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, and in many cases the appropriate form of proceeding is by indictment. (*The United States by indictment vs. James E. Abbott*, 9 Internal-Revenue Record, p. 186.)

In *Ex parte Marquand*, (2 Gall., 552,) it was held that a fine for obstructing officers of customs imposed by the court after conviction on an indictment drawn under the 71st section of the act of March 2, 1799, was to be distributed pursuant to the 91st section of the same act; and that decision, so far as is known, has never been questioned. The language of this 179th section of the internal-revenue act of June 30, 1864, gives, where it is not otherwise provided, a share of the fine, penalty, or forfeiture to the person who shall first inform, &c., without any limitation in regard to the form of proceeding by which the fine, penalty, or forfeiture may or must be recovered. The purpose of the provision was to stimulate the vigilance and activity of revenue officers to discover evidence, as well as to induce unofficial persons to give information, whereby violations of the law could be detected and punished. The form of the prosecution seems to be immaterial in respect to the rights of any person claiming as informer, and seems to have been so considered by Congress; and I am of opinion that, under the statutes now in force, the fact that a fine or penalty can be recovered only by indictment is no objection to the claim of any person to be declared informer. Whether the disposition or distribution of a fine, penalty, or forfeiture imposed by any particular provision of the internal-revenue laws is otherwise provided for than by said 179th section as amended, must be determined by the true construction of the language of the statutes relating to that particular fine, penalty, or forfeiture. If, on that construction, a different provision is made in this respect, it must be followed, whether the appropriate form of proceeding to recover the fine, penalty, or forfeiture is by indictment, information, or a civil action. If no such different provision is made, the distribution must be in accordance with the provisions of the 179th section.

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By the express words of the statute, the information given must be "of the cause, matter, or thing whereby the fine, penalty, or forfeiture shall have been incurred;" and in order to be declared an informer a person must prove that he was the first to give substantially the information required by the statute. The information given must be voluntarily given for the purpose of having it acted upon, in order to recover the fine, penalty, or forfeiture, or to obtain the payment of money in lieu thereof, and must be so far definite and relevant that the officer or person acting upon it can, with reasonable and ordinary diligence, find the property forfeited or the person who has incurred the fine, penalty, or forfeiture, as well as evidence sufficient to obtain judgment against either the person or property, as the case may be, or the payment of money in lieu of the fine, penalty, or forfeiture; and must actually, directly, and proximately lead to the recovery of the fine, penalty, or forfeiture, or of the money paid in lieu thereof, and be so far material that, without it, the fine, penalty, or forfeiture would not have been recovered, or the money paid.

If the information given leads to no result, or if, leading to a result, it was not given as information for any such purpose, or if the information given or the facts discovered were not acted on so that they conduced as the proximate and efficient cause to the result, then no information has been given within the meaning of the statute. The statute does not state to whom the first information must be given in order to entitle the person giving it to be declared informer; but the intention is, I think, that it should be given to the United States, that is, to some person representing the United States for the purpose of administering the internal-revenue laws. The duty of the United States attorneys to see that all laws of the United States, and of internal-revenue officers to see that the internal-revenue laws are faithfully administered, and offenders against them punished, is a special duty imposed upon them by virtue of their offices, and not the general duty imposed on all citizens to see that the laws are executed and obeyed. Internal-revenue officers are expressly required by statute to report to the next superior officer and to the Commissioner of Internal Revenue, any knowledge or information

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they may have of the violation of any revenue law by any person. See section 6 of the act of March 31, 1868, (15 Stat., 60,) and section 98 of the act of July 20, 1868, (15 Stat., 165.) Therefore, a communication from one revenue officer to another, or from any revenue officer to a United States attorney, or *vice versa*, is not *first informing* within the meaning of the statute, because the knowledge, when first obtained by any revenue officer, or by a United States attorney, must be considered as obtained for the purpose of administering the internal-revenue laws of the United States; and the subsequent transmission of it is not an imparting to the United States of new information. If the officer who first learns the facts whereby the fine, penalty, or forfeiture has been incurred makes the discovery by his own diligence and investigation, then he is, I think, the first informer; because by his own voluntary diligence and skill he has first discovered the facts or informed himself of them, upon which information it is his duty to take action, either directly or by communicating what he has learned to some other officer charged especially with the duty of prosecution. If he has learned the facts from others, either wholly or in such part that, by the exercise of ordinary skill and diligence, he can find out the cause, matter, or thing whereby the fine, penalty, or forfeiture has been incurred and the person or property in respect to which the fine, penalty, or forfeiture has been incurred, and this information has been communicated to him by some unofficial person, voluntarily and for the purpose of having it acted upon by the officer, then, I think, such person is the informer; but mere communication of facts from one unofficial person to another, with no purpose of having them communicated to any official person in order that he may use them to recover any fine, penalty, or forfeiture that has been incurred, cannot be regarded as giving information within the meaning of the statute. So far as the statute affects an internal-revenue officer, it means substantially the officer who, by his own voluntary exertion and skill, first discovers the cause, matter, or thing whereby the fine, penalty, or forfeiture has been incurred; and so far as it affects other persons, it means the person who first gives the information to some officer for the purpose of having it acted upon by him, and with such full-

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ness that with reasonable diligence and skill he can find the proofs and the property or person. So far as the information is obtained by process of law through the examination of witnesses before magistrates, grand juries, or courts, or the examination of persons or the books of persons by a supervisor or assessor pursuant to law, to the extent that such persons testify or furnish information by the production of their books, pursuant to legal process, I do not think they can be regarded as giving information within the meaning of the statute; nor do I think that any information obtained by officers in this manner can be regarded as discovered by them. They have used the process of law to compel disclosures, and the disclosures made are not the result of their own exertion so much as the obedience of persons to process and proceedings which the laws compel them to submit to.

So far as internal-revenue officers have rights beyond other persons to enter and inspect buildings and places used for certain purposes, this seems to me an advantage which the law gives them, and yet does not debar them from being informers, if, by reason of such inspection, they first discover the cause, matter, or thing whereby a fine, penalty, or forfeiture has been incurred. This is distinguishable from a discovery of evidence against persons or their property by an examination of the books of such persons or of the persons themselves, if they are compelled by lawful process to produce their books, or to submit themselves under oath to an examination; because, in this case the information is given by the person who is examined, or who produces the books for examination involuntarily and against himself, which excludes him from being regarded as an informer. The information is not furnished by the officer who makes the examination, nor is it discovered by any unaided diligence of his, but by the process of the law; and for this reason the officer is excluded. But the information previously given to an officer, or the facts previously discovered by him, may be so far definite, distinct, and important as to reasonably require an examination of persons or books, and the evidence discovered by such an examination may be held to be but the result of ordinary and reasonable diligence in following up the information previously gained, and then the person first giving the informa-

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tion, or the officer first discovering the facts, would be entitled to be declared informer.

I have not considered whether, under the act of February 25, 1868, (15 Stat., 37,) any information obtained by an examination of persons, or by compelling the production of their books, in the manner above mentioned, would be competent evidence in a prosecution to recover a fine, penalty, or forfeiture.

In reference to the claims of subordinate officers who are acting subject to the general or special instructions of their official superiors, I have to say, without considering what classes of officers are so subject, or how far the authority of their official superiors extends, that it seems to me, when facts are discovered by an inferior officer acting under such instructions, the question whether he is entitled to be declared informer depends upon the character of the instructions given him by his official superiors, whether they are general or specific, and how specific. I do not think the superior officer can in any such case be regarded as an informer from any information given him by an inferior revenue officer acting under his instruction; because an internal-revenue officer is not an informer unless by his own voluntary exertions he first discovers the cause, matter, or thing whereby the fine, penalty, or forfeiture has been incurred; but whether the subordinate officer is in such case to be regarded as an informer in consequence of what he discovers while acting under these instructions, depends upon how far his discoveries were the result of his own exertion and skill, and how far they were the result of the instructions given him. If his instructions were general, then it may be held that what he discovers is discovered by himself, and inures to his own benefit as informer. If his instructions were particular in regard to the place to be searched, and the causes, matters, or things to be searched for, and if any person by the exercise of ordinary and reasonable diligence and skill must have discovered what he did discover acting pursuant to his instructions, then, it seems to me, he ought to be excluded from sharing as informer.

I do not propose to consider the case of officers who, working together, jointly contribute to the discovery of material

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facts, all of which are necessary to obtain a successful result; nor of persons who each communicate to an officer material facts which they have learned independently of each other, all of which facts are necessary to the recovery of the fine, penalty, or forfeiture, and without any one of which it could not be recovered—further than to say that there may be circumstances which require that more than one person in one case should be declared informers. I express no opinion whether the detectives whom the Commissioner of Internal Revenue is authorized to employ by the 50th section of the act of July 20, 1868, (15 Stat., 145,) are entitled to be regarded as informers on account of any facts that may be discovered and communicated by them while acting under this employment, or are entitled to receive any other compensation for their services while in this employment than what has been agreed upon between them and the Commissioner, as I do not understand these questions to have been submitted to me. I do not think these persons are internal-revenue officers.

I have not considered it necessary to distinguish between the different classes of internal-revenue officers, as their right to be declared informers in any particular case seems to me not to depend upon the particular office they hold, but upon what they themselves have discovered and done to insure the recovery of any fine, penalty, or forfeiture, or the payment of money in lieu thereof.

It is almost impossible safely to express opinions upon hypothetical cases, and, it seems to me, far better to leave special cases to be determined when they arise. So far as the claims of informers are to be determined by the courts, they of course are not within your discretion or control; but it seems to me desirable that your action should conform as nearly as possible to the decisions of the courts whenever those decisions appear to have been well considered and are uniform, or whenever any decision has been made by the Supreme Court.

Very respectfully,

E. R. HOAR.

Hon. GEO. S. BOUTWELL,
Secretary of the Treasury.

Customs Service.

tain the fact that the merchandise had received damage during the voyage.

The question asked me, then, is, Whether these port-wardens are *the proper officers of the port* to ascertain if merchandise imported has received damage during the voyage, within the meaning of this section?

The port-wardens of the port of New York are a board of officers established by the laws of the State of New York. They are appointed by the governor, by and with the advice and consent of the senate of that State, and are in no respect officers of the United States. They are, by the laws of the State, invested with certain powers and charged with certain duties relative to the examination of the condition and storage of the cargoes of vessels, the ascertainment of the cause of any damage thereto which may be discovered by them, and the survey of vessels which have suffered wreck or damage, or which may be deemed unfit to proceed to sea; and they are paid by fees fixed by the laws of the State.

From an examination of other sections of the act of March 2, 1799, as well as of the 52d section, I am led to the conclusion that these port-wardens are not the persons meant by the words "proper officers of the port or district" found in the 52d section, but that the officers meant are the customs officers of the port or district appointed pursuant to the laws of the United States. This act established certain collection districts and ports of entry and of delivery within the districts; and for each of the districts it authorized the appointment of one or more revenue officers, such as collectors, naval officers, surveyors, &c., who are to reside at some port of entry or of delivery specially named therein. These officers are in different sections of the act described as the collector or naval officer, &c., of the *district*, or as the collector or naval officer, &c., of the *port*, or as officers or proper officers. (See sections 2, 20, 21, 26, 30, 32, 35, and 51.) The language of section 52, namely, "proper officers of the port or district," is similar to that used in the preceding sections of the act where customs officers are unquestionably meant.

That this is the true construction of these words in the 52d section, seems manifest from other parts of that section, in which it distinctly appears that the fact that the damage

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was received by the goods during the voyage, as well as the rate or percentage of the damage, must be found by the appraisers, although it is not probable that their finding that the damage was received during the voyage is conclusive upon the proper officers of the port or district. The appraisers to be appointed under this section were not officers, but merchants. It was not until a long time after the passage of the act of March 2, 1799, that statutes were passed authorizing the appointment of appraisers as revenue officers.

Proof to ascertain the damage was, by the proviso in the section, required to be lodged in the custom-house within ten days after the landing, if the merchandise had been entered, the duties on it paid or secured to be paid, and the delivery permit granted, because, in that case, the merchandise had passed out of the possession of the customs officers; but if a delivery permit had not been granted, as the merchandise would still be in the possession of the customs officers, this proof was not required to be lodged in the custom-house. The proviso was intended to exclude claims for allowance made after the merchandise had passed out of the possession of the customs officers, so that it could not be inspected by them, and after such time had elapsed as would prevent the customs officers from readily and certainly ascertaining the truth in regard to the damage claimed.

Even if it should be thought that the port-wardens might fall within the designation of officers of the port, they are not officers of the collection district, and the statutory designation is "the proper officers of the port or district," meaning plainly the customs officers, who are officers of the district as well as of the port.

There are other considerations which lead to the same conclusion. A statute of the United States should not be so interpreted as to require the aid or action of the officers of a State for its administration, unless its language is plain that State officers were intended to be employed in administering it. The presumption certainly is that the officers mentioned in a statute of the United States who are to carry out its provisions, are officers of the United States, if there are any officers of the United States such as are described in the statute. In many ports of entry of the United States there

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are no port-wardens, and a construction that would require certain things to be done by officers of a State, in administering the revenue laws of the United States, when the provision so construed is not made to take effect on the condition that there shall be such officers, and when, in fact, in most of the ports, there are no such officers, and there is no provision in the statutes of the United States looking to the appointment of any such officers, must be avoided, if it can be done consistently with the established rules for the construction of statutes. No such construction of the language of the said 52d section is required or can be maintained. Under this section, the proper revenue officers of the port or district can require such preliminary proof that the merchandise has received damage during the voyage as may seem to them necessary to establish a proper case for appraisement. The kind and amount of this preliminary proof is not defined by the statute, and was meant to be left to the discretion of the revenue officers. It may be any evidence that convinces them that a probable case of damage to merchandise, thus sustained, has been so far made out as to require an appraisement, and they must finally determine whether the damage the appraisers find to have been received was received during the voyage.

Very respectfully, your obedient servant,

E. R. HOAR.

Hon. GEO. S. BOUTWELL,
Secretary of the Treasury.

INSPECTION OF STEAM-VESSELS.

Where a steam-tug was owned by the Government and used by the War Department in towing dredging machines and scows, and for other like purposes: Held that it was not subject to the inspection laws of the United States, relating to steam-vessels, and that unlicensed pilots and engineers might lawfully be employed upon her.

Public vessels, within the meaning of the inspection and navigation laws, are vessels owned by the United States and used by them for public purposes.

These laws do not warrant any distinction between public vessels under the control of the Navy Department and public vessels under the control of any other Department of the Government.

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ATTORNEY-GENERAL'S OFFICE,

June 1, 1870.

SIR: Your letter of November 3, 1869, with the papers transmitted with it, submits for an opinion the questions whether the steam-tug "Robert Leslie" is amenable to the inspection laws of the United States, or is exempt from their provisions as a public vessel of the United States, and whether unlicensed pilots and engineers can be lawfully employed upon public vessels of the United States.

The papers accompanying your letter disclose a difference of opinion upon these questions between the Secretary of the Treasury and the late Secretary of War. The Secretary of War in his letter to you of the 27th of October, 1869, says that "the vessel in question was built for, and is owned by, the United States; is in charge of an officer of the Army of the United States, and operated by Government employés, and is exclusively employed in the public service;" that, in his opinion, "the inspection laws, designed as they are for the protection of human life on passenger vessels, are not applicable to this steam-tug, and that the interference of the local inspectors at Baltimore with the vessel and Government employés thereon—of which interference complaint is made by the United States engineer officer in charge of the Patapsco River improvement—should cease, and the Department of War should not be subjected to the payment of inspection fees, for the collection of which there is no legal authority."

My attention is called by you to a letter addressed, under date of June 3, 1863, to the supervising inspector of steam-boats at Baltimore by the Secretary of the Treasury, in answer to an inquiry whether a supervising inspector had a right to go within the military departments of his district for the purpose of inspecting vessels belonging to or chartered by the Government, except such as belonged to the Navy. In this letter the Secretary of the Treasury says that it is not only the right, but the imperative duty, of the supervising inspector "to go into such military departments for the purpose of inspecting vessels employed therein; that the security of the lives of persons in the public service, whether serving in a civil or military capacity on board Government trans-

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ports or other vessels, (whether owned or chartered is immaterial,) and the protection of Government property, are objects quite as important as the safety of private citizens and the protection of private property, and so equally within the scope of the inspection laws."

The steam-tug "Robert Leslie" was used by the Engineer's Department of the Army in towing dredging-machines and scows, and for other purposes necessary in carrying out the public improvements in the Patapsco River, which had been authorized by acts of Congress; and the actual case upon which I am asked to give an opinion is, whether this steam-tug, while so owned and used, was subject to the inspection laws of the United States relating to steam-vessels, and whether unlicensed pilots and engineers could lawfully be employed upon her.

The statutes of the United States for the registration or enrollment of vessels passed before the passage of any acts relating to steam-vessels exclusively, were not applicable to vessels owned by the United States, but only to vessels owned by a citizen or citizens of the United States. The act of May 12, 1812, (2 Stat., 694,) permitted and required the enrollment and license of steamboats employed in the rivers or bays of the United States, though owned wholly or in part by an alien if resident within the United States; and the act of March 3, 1825, (4 Stat., 129,) permitted the enrollment and licensing of steamboats owned by an incorporated company. The act of July 7, 1838, (5 Stat., 304,) required the owners of steam-vessels to make a new enrollment, and to take out new licenses, and provided for the appointment of persons to inspect the hulls of steamboats and vessels propelled in whole or in part by steam, and persons to inspect the boilers and machinery employed in the same.

This act does not expressly include vessels owned by the United States. It subjects the owner or owners to penalties, if they do not comply with its provisions, and seems applicable only to such steamboats as under previous laws were required to be enrolled, as it requires the owners to make a new enrollment. It is manifest that it was intended to apply only to steam-vessels owned by persons, whether citizens or aliens, or an incorporated company.

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The act of August 30, 1852, (10 Stat., 61,) was in amendment of the act of July 7, 1838, and by its 1st section prohibited the granting of any license, register, or enrollment to any vessel propelled in whole or in part by steam and carrying passengers, until the provisions of the act had been fully complied with, under the penalty provided in the 2d section of the act of July 7, 1838, one-half of which was to be recovered for the use of the United States, and one-half for the use of the informer. It made new provisions for the appointment of an inspector of hulls and an inspector of boilers, and for the licensing of engineers and pilots of steamers carrying passengers, and also made provision for the appointment of supervising inspectors. The 42d section provides "that this act shall not apply to public vessels of the United States or vessels of other countries, nor to steamers used as ferry-boats, tug-boats, towing-boats, nor to steamers not exceeding one hundred and fifty tons burden, and used wholly or in part for navigating canals," &c. The tenth paragraph of the 9th section makes it unlawful "for any person to employ, or any person to serve as engineer or pilot on any such vessel, who is not licensed by the inspectors," &c.; but by the words "such vessel," is meant a vessel propelled in whole or in part by steam, carrying passengers—not a public vessel of the United States, nor a vessel of another country than the United States, nor a steamer used as a ferry-boat, tug-boat, towing-boat, &c. The steam-tug "Robert Leslie" was plainly not subject to the provisions of this act.

The 4th section of the act of June 8, 1864, (13 Stat., 120,) provided "that the 42d section of the act of August 30, 1852, be so construed as to require the inspection of the hull and boiler in the manner prescribed by that act, of every vessel propelled in whole or in part by steam, and engaged as a ferry-boat, tug, or towing-boat, or canal-boat, in all cases where, under the laws of the United States, such vessels may be engaged in commerce with foreign nations or among the several States." The "Robert Leslie" was not engaged in commerce with foreign nations or among the several States.

The act of July 25, 1866, (14 Stat., 227,) provided by its 7th section "that steamers used as freight-boats shall be subject to the same inspection and requirements as ferry,

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tug, and canal boats," &c.; but the "Robert Leslie" was not used as a freight-boat. By its 9th section the act provides "that all vessels navigating the bays, inlets, rivers, harbors, and other waters of the United States, except vessels subject to the jurisdiction of a foreign power and engaged in foreign-trade, and not owned in whole or in part by a citizen of the United States, shall be subject to the navigation laws of the States," &c. "And every sea-going steam-vessel now subject or hereby made subject to the navigation laws of the United States, and to the rules and regulations aforesaid, shall, when under way, except upon the high seas, be under the control and direction of pilots licensed by the inspectors of steam-vessels, vessels of other countries and public vessels of the United States only excepted." Is the "Robert Leslie" a public vessel of the United States within the meaning of this exception? If she is, then she is not subject to the navigation laws of the United States; if she is not, then the question is whether she is a vessel navigating the bays, inlets, rivers, harbors, and other waters of the United States within the meaning of the first clause of the section.

The suggestion is made that, by a public vessel is meant a vessel of the Navy of the United States, but not a vessel owned by the United States and employed for public purposes, not of the Navy—such, for example, as a revenue-cutter or this steam-tug. But I am unable to put any such construction on the statutes I have cited. Public property means property of the United States, and public vessels must be held to mean vessels owned by the United States and used by them for public purposes. All the prohibitions of the statutes upon the owners of steam-vessels imply that the owners are persons or private corporations who can be made amenable to the laws, and not that the owner is the Government itself.

The first purpose of these enactments was to protect the lives of passengers; the next was to regulate navigation and commerce. Vessels owned by the United States and used for public purposes are no more within the reason than they are within the letter of these statutes, and to distinguish public vessels that are under the control of the Department of the Navy from vessels owned by the United States and

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employed for public purposes by other Departments, seems to me not warranted by the language of the acts. I think that the steam-tug "Robert Leslie," while used in the manner mentioned, was not subject to the inspection laws of the United States, and that unlicensed pilots and engineers could have been lawfully employed upon her.

Very respectfully,

E. R. HOAR.

Hon. GEO. S. BOUTWELL,
Secretary of the Treasury.

SEIZURES UNDER THE CUSTOMS LAWS.

Where a distribution of the proceeds of a forfeiture under the impost laws had been made and the money paid over by a former Secretary of the Treasury, and no newly-discovered evidence was produced affecting the correctness of the distribution, and no allegation made of fraud or willful concealment of facts: Advised that the present Secretary would not be justified in re-opening the case on the grounds stated, as it is to be presumed that both the law and the facts were correctly decided by his predecessor.

Any unofficial person may seize property as forfeited to the United States, and the Government, if it chooses, may adopt the seizure and make it the basis of legal proceedings.

If a revenue officer, whose official duty it is to make seizures of property for violation of the revenue laws, actually makes a seizure of merchandise while it is in his custody for the purpose of administering the customs laws, such officer is, nevertheless, to be regarded as the seizing officer.

ATTORNEY-GENERAL'S OFFICE,

June 4, 1870.

SIR: I have the honor to acknowledge the receipt of your letter of the 27th of October last, with the accompanying papers.

You ask me whether you have any power to correct an alleged error in the distribution by the late Secretary of the Treasury of the proceeds of a forfeiture of the cargoes of the vessels "Alice Ball" and "Reindeer," decreed by the district court of the United States for the district of California.

It appears that Mr. McCulloch, late Secretary of the Treasury, in February, 1868, pursuant to the 1st section of the act of March 2, 1867, (14 Stat., 546,) distributed the residue of the pro-

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ceeds after making the deductions authorized by that section, in the following manner: One-half to the United States, one-fourth in equal parts to the collector, naval officer, and the surveyor of the port of San Francisco, where the seizure was made, and one-fourth to the collector of the port as the officer making the seizure; Mr. McCulloch finding, as a fact, that there was no informer other than the collector, naval officer, or surveyor; that at the hearing before the Secretary, Mr. Matthew Scott claimed to be entitled to one-fourth as informer, and the collector claimed that Scott was not an informer, and that he (the collector) was the seizing officer; that the claim of Scott was rejected, and this claim of the collector allowed; that the money was paid out of the Treasury to the collector, the surveyor, and the naval officer according to the decision of the Secretary; and that after the money was so paid, viz., some time in November or December, 1868, the Department of the Treasury was informed that the collector's claim as seizing officer "was not based upon an actual seizure made by him of the property when in the hands of others, but upon an order to detain for legal proceedings goods which, at the time such order was given, were already in the possession of the officers of the customs for the purpose of appraisal or otherwise;" and you say that "a similar case had in the mean time arisen at another port, and the Department had decided that such constructive seizure gave no rights as seizing officer. This opinion was reiterated in reply to a question from Mr. Bryant in a letter of which the inclosed is a copy."

Mr. Scott has petitioned for a re-examination of the case, and Mr. Bryant, the naval officer, also asks that it may be re-examined, claiming that, if there is no informer, he is entitled to one-third part of a moiety of the sum distributed under a decision of the late Secretary to the effect "that when goods, being already within the official custody of the collector for any purpose, are then seized while within that custody, for violation of law, whether by the collector in person, by direction to a subordinate or otherwise, it is held that there is no *seizing officer* within the meaning of the act of March 2, 1867," and in accordance with the opinion of Attorney-General Stanbery, dated October 29, 1867, (12 Opinions, 291.)

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A distribution in the manner last mentioned would give to Mr. Bryant \$5,471.93 more than he has already received; and you ask whether, if you have the power to re-examine this case, and if you decide upon re-examination that the proceeds should be distributed in the manner last mentioned, you have also the right to withhold from the shares of the proceeds of other forfeitures to which the collector is entitled the sum of \$5,471.93, and to pay it to Mr. Bryant.

The case was determined by your predecessor in office, and the money paid more than two years ago. Mr. Scott asks you to re-examine it, on the ground that your predecessor came to an erroneous conclusion upon the question whether Scott was an informer; and Mr. Bryant asks you to re-examine it on the ground either that your predecessor did not correctly find the fact in regard to the seizure of the goods while they were in the custody of the customs officers, or if Mr. McCulloch did correctly find that fact, that then he erred as a matter of law in deciding that the collector by seizing goods in the predicament mentioned became the officer making the seizure within the meaning of those words in the 1st section of the act of March 2, 1867. There is no allegation of fraud or a willful concealment of facts, or of any evidence newly discovered by either Mr. Scott or Mr. Bryant.

I do not think you would be justified in re-opening this case under the circumstances and on the grounds stated. The reasons for this opinion appear in opinions of Attorneys-General heretofore given. (See opinion of April 26, 1869, in the case of Rear-Admiral Goldsborough; the opinion in Chorpening's case, 12 Opins., 355; 11 Opins., 129; 10 Opins., 255, and the opinions therein cited.)

You ask my opinion upon the correctness of the decision of the late Secretary of the Treasury, that there is no seizing-officer within the meaning of the act of March 2, 1867, when the merchandise is seized while in the possession of the customs officers, only in the event that I think you have the power to re-examine the special case stated in your letter; and as I think you should not re-examine that case, I am not actually called upon to consider this question; but I cannot forbear saying that, as under the customs laws in nearly all, if not in all, cases of forfeiture of specific property, a seizure

Seizures under the Customs Laws.

of the property forfeited is a necessary preliminary to the institution of a suit to obtain a judgment of forfeiture, and as merchandise imported and entered may be seized as forfeited before its delivery from the custody of the customs officers to the importer, I am at a loss to understand how such a seizure can be made unless some person makes it. Any unofficial person may seize property as forfeited to the United States, and the Government, if it chooses, may adopt the seizure and make it the basis of legal proceedings; but it is the official duty of certain revenue officers to make seizures of property for violations of the revenue laws, and among such officers are collectors, naval officers, and surveyors, and if any of these officers actually makes a seizure of merchandise while it is in his custody for the purpose of administering the customs revenue laws which is the custody of the law, I do not understand why he is not the officer who makes the seizure. The seizure and detention of imported merchandise for the purpose of instituting a suit to obtain a judgment of forfeiture against it is a different thing from detaining merchandise for the purpose of appraisement and to secure the payment of the duties upon it, and the liabilities of an officer in reference to a seizure made by him are different and distinct from his ordinary official liabilities. There are obvious reasons why Congress, if it had seen fit, might have granted to a seizing officer a less share than he would otherwise receive, if the merchandise when seized was already in his official custody, but no such distinction appears in the statutes.

The third question considered by Mr. Stanbery in the opinion of October 27, 1867, already referred to, (12 Opins., 295,) rests upon the assumption that there is no informer and no seizing officer. Mr. Stanbery does not decide that a customs officer cannot seize merchandise as forfeited to the United States while it is in the custody of customs officers for the purpose of determining the amount of duties payable upon it, or for securing their payment, or enforcing other provisions of the customs laws. If an unofficial person makes a seizure which is the basis of legal proceedings, and waives any claim as informer, and there is no other person who claims to be an informer, that would present a case

Money Received from Enlisted Persons.

where there is neither an informer nor a seizing officer. In the case stated in your letter, whether the collector did or did not make the seizure was a question of mixed fact and law, depending upon what he actually did, and what in law constitutes making a seizure, and it is to be presumed that both the law and the fact were correctly decided by your predecessor.

Very respectfully, your obedient servant,

E. R. HOAR.

Hon. GEORGE S. BOUTWELL,

Secretary of the Treasury.

MONEY RECEIVED FROM ENLISTED PERSONS.

Certain enlisted persons, having received bounty-money from the localities to which they were credited, delivered the same to the recruiting officer in compliance with a regulation of the service, and subsequently, on their arrival at the regimental depot, they underwent a re-examination, were rejected on account of disabilities existing prior to their enlistment, and were discharged; afterwards, in pursuance of a general order, the money was deposited by the officer in the Treasury to the credit of an appropriation under the control of the War Department; claim being now made for the money: *Held* that the Department cannot lawfully retain it, after deducting therefrom any sums due the United States from the persons referred to.

ATTORNEY-GENERAL'S OFFICE,

June 7, 1870.

SIR: The letter of the late Secretary of War, dated May 6, 1869, relates to the claim of William Jameson, as assignee of George S. Miller and John Haines, for money now in the Treasury of the United States to the credit of an appropriation under the control of the Department of War.

The facts are that Miller and Haines in October, 1864, enlisted into the Army of the United States, and received the money now claimed as bounties from the localities to which they were credited. This money was delivered to the recruiting officer, Captain William M. Quimby, and held by him pursuant to a general order issued by the Secretary of War until it was paid into the Treasury of the United States. The men were formally enlisted into the Army, but on their arrival at the regimental depot they were there re-examined

Money Received from Enlisted Persons.

by a board of inspectors, and were rejected by reason of disabilities existing prior to their enlistment, and they were discharged. The money received from them by the recruiting officer was covered into the Treasury in accordance with an order of the Department of War of the date of July 21, 1864, to the effect that "all funds that have been, or may hereafter be, received by recruiting officers of the Regular Army from soldiers discharged from the United States service for disability existing prior to their enrollment, as a balance due the Government, and received by them for bounty, premium, and advanced pay, together with all funds deposited by enlisted men as security for their return upon receiving furloughs, and forfeited by their desertion, will be forwarded by the officer receiving the same to the Treasury of the United States, to be credited to the appropriation for recruiting the Regular Army."

The money was received and deposited in the Treasury prior to the issuing of Circular No. 2, dated January 4, 1865, directing that, "Hereafter all funds that may have been paid recruits for the Regular Army as local bounties, and which have been retained by recruiting officers until they have joined their regiments, will be refunded to the recruits when discharged at depot for disability existing prior to enlistment."

Jameson, the assignee of Miller and Haines, has brought suit against Captain Quimby in the supreme court of the State of New York to recover the money received by him from Miller and Haines.

Upon this state of facts, you ask my opinion whether the Department of War can legally retain the money claimed; and you call my attention to the difference of opinion existing between the Adjutant-General and Judge-Advocate-General.

The Adjutant-General is of the opinion that the money should remain in the Treasury to the credit of the appropriation for recruiting the Regular Army, and should not be refunded to Miller and Haines, or their assignee, Jameson. The Judge-Advocate-General says, "The bounties in this case were paid to the men by the localities as the consideration of their entering the service as part of the quotas of the districts. The men were formally enlisted and accepted by the

Mail Contracts.

Government; and it is presumed, of course, that the usual medical examination was had as required by the regulations. There is no allegation of any fraud by the recruits in concealing any disability to their properly serving as soldiers. They were afterward, on their arrival at the regimental depot, examined by a board of inspectors, rejected on account of disability existing prior to enlistment, and discharged. This was on October 23, 1864. It is clear that the Government should then have notified the localities, canceled the credit of their quotas, and called upon them for new men. It did not do so, and thus lost the only remedy of which it could have availed itself. For neither then could it have, in the opinion of this Bureau, legally retained, nor can it now legally retain, any portion of the bounty-moneys." And the Judge-Advocate-General recommends "that the amounts in question be paid to the parties upon the terms offered by their attorney—of a withdrawal of the suit against Captain Quimby, and an acquittance given in full of all claims, costs, &c., against the Government."

In an opinion dated February 8, 1870, given to the Secretary of the Treasury, I had occasion to consider a question in some respects analogous to the one you ask, and I beg leave to inclose a copy of that opinion. I agree with the Judge-Advocate-General, that the War Department cannot lawfully retain the money claimed after deducting therefrom any sums due the United States from Miller and Haines.

Very respectfully, your obedient servant,

E. R. HOAR.

Hon. WM. W. BELKNAP,
Secretary of War.

MAIL CONTRACTS.

Sembler that the clause in mail contracts authorizing a discontinuance of the service by the Postmaster-General on payment of one month's extra pay is inapplicable to a case where, without any interference of the Postmaster-General or any order on his part, the further execution of the contract has become impossible or illegal.

Accordingly, the issue of an order by the Postmaster-General in May, 1861,

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under the act of February 28, 1861, suspending postal service in certain States then in insurrection, could not entitle a contractor for carrying the mail in one of those States to a month's extra pay in virtue of such clause in his contract.

ATTORNEY-GENERAL'S OFFICE,
June 11, 1870.

SIR: I have the honor to acknowledge the receipt of your letter of the 3d instant, in which you ask my opinion upon the effect of the order of Postmaster-General Blair, issued on the 27th of May, 1861, under the act of Congress of February 28, 1861, (12 Stat., 177,) which order was as follows: "All postal service in the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Arkansas, and Texas will be suspended from and after the 31st instant."

It seems that Daniel M. Martin was a contractor on three routes in Alabama for a term extending from 1858 to 1862, and that his contract contained a clause as follows, viz: "The Postmaster-General may curtail, or discontinue the service in whole or in part, in order to place on the route a greater degree of service, or whenever the public interests require such discontinuance, or curtailment, for any other cause, he allowing one month's extra pay on the amount of service dispensed with." Martin was paid upon his contract up to the 31st of May, 1861, and claims one month's pay in addition. You ask whether this case can be distinguished from the case of *Reeside vs. The United States*, (8 Wall., 38.)

I have found some difficulty in understanding the grounds upon which Reeside's case was decided, the court, in their opinion, making a variety of statements, and then announcing their decision without distinguishing particularly upon which of the grounds the decision is to rest. It is my own opinion that the clause in the contract authorizing a discontinuance of the service by the Postmaster-General, on payment of one month's extra pay, could have no application to the case where, without an interference of the Postmaster-General, or any order on his part, the further execution of the contract had become impossible or illegal; and I am inclined to think that this doctrine is recognized by the court when they say, on page 42, that, assuming that a civil war

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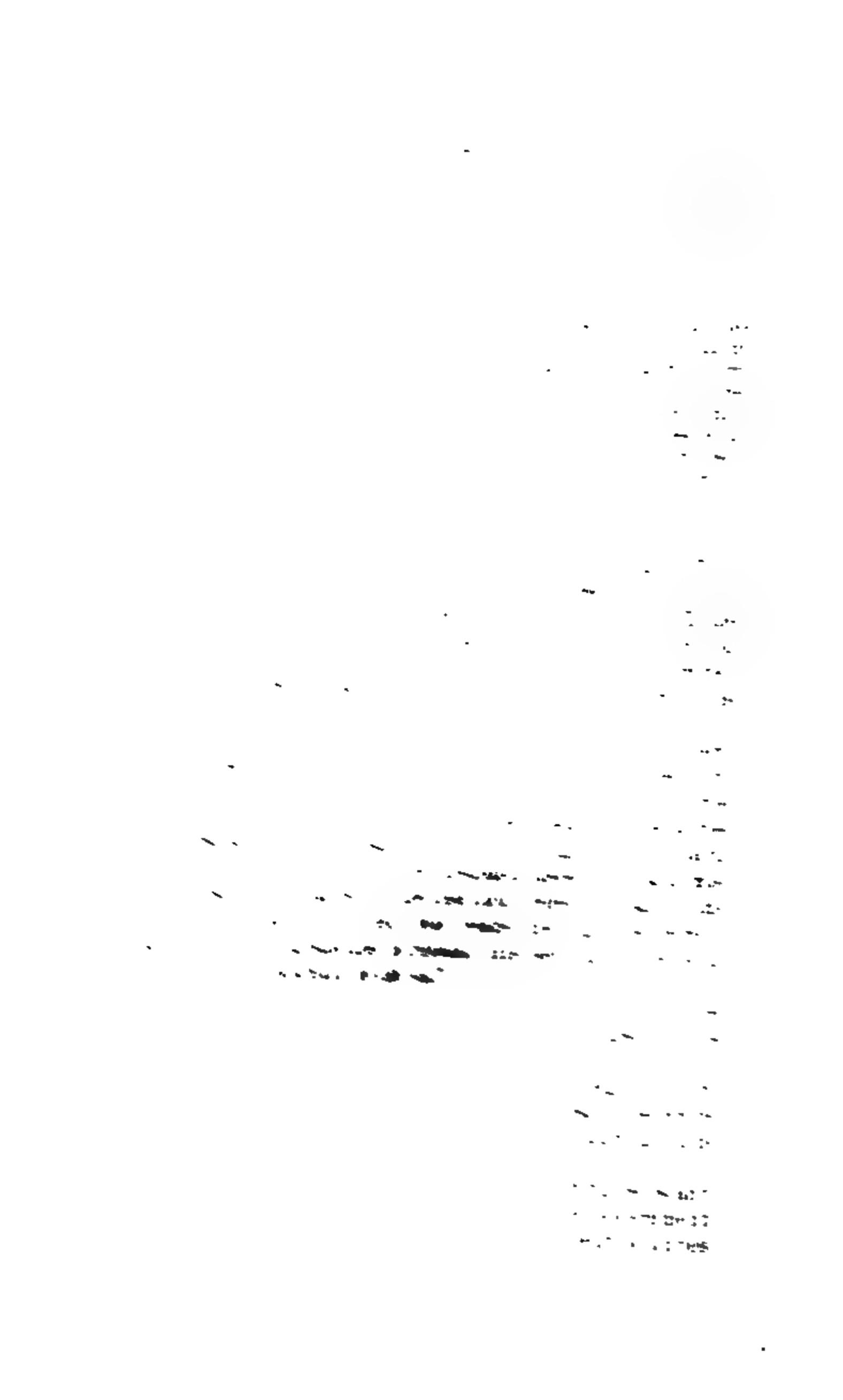
existed between the United States and the States within which the mail-routes lay, and that "all intercourse with them was illegal upon the principles of international law, * * the Government would have been justified in putting an end to the contracts ; and, in the absence of any interference on the part of the Government, the contractor might also have terminated them." But in Reeside's case, it appeared that the Postmaster-General refused to annul the contracts, and insisted that the contractor should hold himself ready to renew the service whenever the Postmaster-General should deem it safe. It seems to be on this ground that the court held Reeside's contract to be suspended, or curtailed, or discontinued under the proviso in the contract, and not by the operation of the state of war existing in the country.

I am of opinion that if, when the Postmaster-General issued the order of the 27th of May, 1861, the mail-routes included in Martin's contract were in a part of the country from which the authority of the United States was then forcibly excluded, and a government hostile to the United States was in fact established, so that no mail service could have been carried on by Martin, on behalf of the United States, which I understand to have been the fact, the contract between Martin and your Department became of itself inoperative, and the postal service under it was discontinued without reference to the order of the Postmaster-General, and the issuing of that order would have no effect to entitle Martin to the amount of one month's extra pay. Whether the Supreme Court would concur in supporting this opinion, I do not feel certain ; but the best consideration which I can give to Reeside's case satisfies me that they have not in that case decided anything to the contrary.

Very respectfully,

E. R. HOAR.

Hon. J. A. J. CRESWELL,
Postmaster-General.



Collection of Duties.

on machinery imported by it for its use, but whether, in the absence of any statute of the United States granting such an exemption, you, as Secretary of the Treasury, have a right to permit the importation by the company of such machinery without the payment of duties.

It is to be noticed that the right of repealing the section granting the exemption from the payment of duties after two years was expressly reserved to the legislature of the republic, if it deemed it expedient to do so. Without expressing any opinion whether the United States are or are not under the same obligations to maintain this charter as the republic of Texas would be under if Texas were an independent nation; yet, even if it were conceded that, by the admission of Texas, the United States assumed all the obligations of that republic toward the company, as the republic expressly reserved the right to repeal the section granting the exemption after two years, and more than two years have already elapsed, it must also be conceded that the United States have the same right to repeal it, or, what is substantially the same thing, that the United States have now the right to impose duties upon machinery imported by the company if they see fit to do so.

Your duty as Secretary of the Treasury is to administer the revenue laws as you find them, and in the absence of any constitutional objection, if they make no exemption, you can make none. Whether this act of incorporation be regarded as a contract, or not, and, if a contract, whether it be one which the United States are bound to keep or not, if the laws do not provide for keeping it, but impose duties on all machinery imported, without any exception in favor of this company, you must see that duties are collected on the machinery imported by the company. There is nothing in the Constitution of the United States that prohibits Congress from passing a law impairing the obligation of contracts, if it sees fit to do so, although such an intention will not be presumed from doubtful language. The obligation to keep the promise of exemption in the act of incorporation, if there be any such obligation, addresses itself to the legislative department, and not to the administrative department of the Government. If Congress do not provide by law for keeping

Collection of Duties.

COLLECTION OF DUTIES.

By a provision in the charter of the Texas Cotton and Woolen Manufacturing Company, which was incorporated by the republic of Texas in 1845, that company was exempted from paying duty on all machinery imported for its use and benefit; the legislature of the republic reserving the right to repeal the provision after two years: *Held*, that though said provision may remain unrepealed, yet, in the absence of any statute of the United States granting such an exemption, the Secretary of the Treasury cannot permit the importation of machinery by the company without the payment of duties.

ATTORNEY-GENERAL'S OFFICE,

June 21, 1870.

SIR: I have considered the question presented by your letter of the 22d of March last. I assume that the Texas Cotton and Woolen Manufacturing Company is a corporation organized under an act of the republic of Texas, approved February 3, 1845. Section 7 of that act of incorporation is as follows:

"Be it further enacted, That all machinery, and machinery for keeping the same in operation, shall be introduced into the republic free of duty or any charge whatever by the Government: *Provided*, That either the president, one of the directors, secretary, treasurer, or general agent, make oath before the proper officer at the custom-houses that said machinery, so imported, is for the use and benefit of said company: *Provided*, That after two years the right is hereby reserved to the legislature to repeal this section whenever it may deem it expedient to do so."

By section 10 the charter granted by the act is to continue in force and effect for the full term of thirty years after its passage.

You ask me "whether said company (if ever legally incorporated) is now entitled, from the United States, to the privileges granted by their charter to import free of duty machinery, &c., for their use."

I do not understand you to ask me whether there is any obligation on the legislative department of the Government to exempt by law this company from the payment of duties

Collection of Duties.

on machinery imported by it for its use, but whether, in the absence of any statute of the United States granting such an exemption, you, as Secretary of the Treasury, have a right to permit the importation by the company of such machinery without the payment of duties.

It is to be noticed that the right of repealing the section granting the exemption from the payment of duties after two years was expressly reserved to the legislature of the republic, if it deemed it expedient to do so. Without expressing any opinion whether the United States are or are not under the same obligations to maintain this charter as the republic of Texas would be under if Texas were an independent nation; yet, even if it were conceded that, by the admission of Texas, the United States assumed all the obligations of that republic toward the company, as the republic expressly reserved the right to repeal the section granting the exemption after two years, and more than two years have already elapsed, it must also be conceded that the United States have the same right to repeal it, or, what is substantially the same thing, that the United States have now the right to impose duties upon machinery imported by the company if they see fit to do so.

Your duty as Secretary of the Treasury is to administer the revenue laws as you find them, and in the absence of any constitutional objection, if they make no exemption, you can make none. Whether this act of incorporation be regarded as a contract, or not, and, if a contract, whether it be one which the United States are bound to keep or not, if the laws do not provide for keeping it, but impose duties on all machinery imported, without any exception in favor of this company, you must see that duties are collected on the machinery imported by the company. There is nothing in the Constitution of the United States that prohibits Congress from passing a law impairing the obligation of contracts, if it sees fit to do so, although such an intention will not be presumed from doubtful language. The obligation to keep the promise of exemption in the act of incorporation, if there be any such obligation, addresses itself to the legislative department, and not to the administrative department of the Government. If Congress do not provide by law for keeping

Police Board of the District of Columbia.

it, as it is not a violation of the Constitution not to keep it, an executive officer must administer the laws in this respect according to their provisions, and cannot be governed by any opinion he may have of what Congress should have done, but has not done.

In any view, Congress clearly has had since February, 1847, the right to impose the same duties upon machinery imported by this company, as upon that imported by other corporations and by persons; and the requirement of the Constitution that "all duties, imposts, and excises shall be uniform throughout the United States," made it the duty of Congress to exercise this right, and the passage of an act imposing duties, without any exemption in favor of the company, must be held to be in exercise of it.

Very respectfully,

E. R. HOAR.

Hon. GEO. S. BOUTWELL,
Secretary of the Treasury.

POLICE BOARD OF THE DISTRICT OF COLUMBIA.

The board of police of the District of Columbia have no authority to employ, in the erection of buildings to be used as police headquarters, the funds saved from past appropriations made by Congress for the payment of salaries and other necessary expenses of the metropolitan police for said District.

ATTORNEY-GENERAL'S OFFICE,

June 24, 1870.

SIR: I have duly considered the question submitted in your letter to me of the 23d of October last, upon a request from the mayor of Washington, District of Columbia, inclosed therewith; and have the honor to state that, in my opinion, the board of police for the District of Columbia have no authority, under existing laws, to employ the funds saved from past appropriations made by Congress for the payment of salaries and other necessary expenses of the metropolitan police for said District, in the erection of buildings to be used as headquarters for the police. By the 15th section of the act of August 6, 1861, (12 Stat., 323,) it is made the duty of the common councils of the

Judge's Certificate in Patent Appeal.

cities of Washington and Georgetown to provide, at the expense of said cities, buildings for the accommodation of the police; and by the 5th section of the amendatory act of July 16, 1862, (12 Stat., 580,) it is expressly declared that such accommodations shall not be established at the expense of the United States. The application of said funds to the purpose mentioned would be clearly inconsistent with these statutory provisions; and, besides, the purpose itself does not seem to fall within the scope of the appropriations referred to.

I return herewith the papers which accompany your letter.

Very respectfully,

E. R. HOAR.

Hon. J. D. Cox,

Secretary of the Interior.

JUDGE'S CERTIFICATE IN PATENT APPEAL.

To be effectual, the certificate of the proceedings and decision of a justice of the supreme court of the District of Columbia in an appeal from the Commissioner of Patents, required to be given and returned by him to the Commissioner under the 11th section of the act of March 3, 1839, must be made and certified by the justice while he is in office; but, if so made and certified, it may be transmitted by him to the Commissioner after he has ceased to be a justice.

ATTORNEY-GENERAL'S OFFICE,

June 27, 1870.

SIR: Your letter of the 14th instant transmits a letter addressed to you by the Commissioner of Patents on the 11th instant, in which he says that Mr. George P. Fisher, late one of the associate justices of the supreme court of the District of Columbia, resigned his office of associate justice, to take effect at the close of Saturday, May 14, 1870, and the resignation was accepted; that on Tuesday, May 17, 1870, a paper was received by mail bearing the Washington post-mark of May 16, 1870, purporting to be an opinion of Mr. Justice Fisher reversing the decision of the Commissioner of Patents in a case of interference, which paper was not in the handwriting of said justice, nor signed with his signature, but which concluded in the following form: "May 14, 1870,

Judge's Certificate in Patent Appeal.

(signed,) George P. Fisher, Justice, S. C., D. C. A true copy, R. J. Meigs, clerk; that on May 18, 1870, a protest was filed in the office of the Commissioner by the party against whom Justice Fisher decided, to the effect that the opinion of the Justice was not returned to the Patent-Office during his term of office. And the Commissioner states the following questions upon which you request my opinion :

“First. Whether the opinion of a justice of the supreme court of the District of Columbia has any effect or is of any binding force until its delivery to the Commissioner of Patents; and

“Second. Whether such an opinion has any effect or is of any binding force if not delivered to the Commissioner of Patents, accompanied by a return of papers to him, during the life-time or tenure of office of the judge.”

In an opinion given you under date of June 9, 1869, I had occasion to refer to the statutes regulating appeals from the Commissioner, but I expressed no opinion upon the capacity in which the justices of the supreme court of the District of Columbia had jurisdiction over such appeals. It seems to me plain, however, that the hearing of these appeals is not a part of their strictly judicial functions, and that in hearing and determining them they act, not as judges or as a court, but as persons designated in the statute for that purpose by their official title.

The 11th section of the act of March 3, 1839, (5 Stat., 354,) provides that “it shall be the duty of said judge, after a hearing of any such case, to return all the papers to the Commissioner, with a certificate of his proceedings and decision, which shall be entered of record in the Patent-Office, and such decision so certified shall govern the further proceedings of the Commissioner in such case.”

As I do not think that the judge or justice in hearing the appeal is in the exercise of his strictly judicial functions, I am of opinion that the certificate required cannot be made by the clerk of the court. The proceedings of the judge in hearing the appeal are no part of the proceedings of the court, and are not of record in it. The certificate required by this section must be made by the judge or justice who hears the case, whose duty it is to make it, and return the papers with

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his decision to the Commissioner, who must enter it of record in the Patent-Office.

It would seem from the statement in the letter of the Commissioner to you, that the decision was made, and the opinion written out and signed by Mr. Justice Fisher, before his resignation took effect; and that it was sent to the clerk of the supreme court of the District of Columbia, and not to the Commissioner. If this be so, and if the opinion signed by Justice Fisher sets forth his proceedings and decision in the case, I see no reason why this opinion cannot be regarded as the certificate required by the statute, and cannot now be sent with the papers in the case to the Commissioner to be entered of record in the Patent-Office. To be effectual, the decision must be made and certified by the justice while he is in office; but if it be made and certified while he is in office, it can be transmitted by him to the Commissioner after he has ceased to be a justice. If the original opinion of the justice, when sent to the Commissioner of Patents, does not prove to be substantially a certificate of the proceedings and decision of the justice in the case, it is now beyond the power of Mr. Fisher to make a new certificate or amend the certificate already made. (See *Doggett vs. Emerson*, 1 W & M., 1.)

Very respectfully,

E. R. HOAR.

Hon. J. D. COX,

Secretary of the Interior.

NOTE.—Under the provisions of the act of July 8, 1870, appeals from the Commissioner of Patents are now taken to the *supreme court* of the District of Columbia, *sitting in banc*, and by the 50th section of that act (16 Stat., 205) it is made the duty of the *court* to return to the Commissioner a certificate of its proceedings and decision, &c.

ILLINOIS TWO PER CENT. FUND.

In stating an account between the United States and the State of Illinois, under the 2d section of the act of March 3, 1857, the Commissioner of the General Land-Office should debit the United States with 5 per cent. of the sales of the public lands in Illinois—including in the computation all the Indian reservations within the State at the rate of one

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dollar and a quarter per acre—and then credit the United States with the amount of the 3 per cent. on such sales already paid the State, together with the whole amount of the 2 percent. fund reserved up to the passage of that act.

*DEPARTMENT OF JUSTICE,

July 6, 1870.

SIR: On the 15th day of October, 1869, I had the honor to receive from you a communication transmitting a letter addressed to you by the Acting Comptroller of the Treasury, asking that you would lay before me, for my opinion, a question which had arisen in his office, and desiring that an opinion might be given upon it accordingly. I have given all the attention to this question which my other official engagements would permit, and have carefully read and considered the voluminous arguments and papers which have been presented in relation to it; and the long delay in returning an answer must be attributed to the intrinsic difficulty of arriving at a satisfactory conclusion.

The question relates to the statement of an account directed to be stated under the 2d section of the act of March 3, 1857, (11 Stat., 200, ch. 104,) between the United States and the State of Illinois, which statute is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Commissioner of the General Land-Office be, and he is hereby, required to state an account between the United States and

* NOTE.—By the act of June 22, 1870, (16 Stat., 162,) which took effect from and after the 1st day of July, 1870, an Executive Department of the Government was established, called the Department of Justice, of which the Attorney-General was made the head, but his duties were to remain the same as then fixed by law, except so far as modified by that act. The same act provided for an officer in said Department, to assist the Attorney-General in the performance of his duties, called the Solicitor-General, who, in case of a vacancy in the office of Attorney-General, or in case of his absence or disability, was to exercise all the duties of that office. It also provided for the continuance in said Department of the two assistants of the Attorney-General, previously authorized to be appointed, who were to aid the Attorney-General and Solicitor-General in the performance of their duties; and the various law officers, then associated with other Departments, as enumerated in section 3 of the act, were transferred to, and placed under the supervision and control of the head of, the Department of Justice.

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the State of Mississippi, for the purpose of ascertaining what sum or sums of money are due to said State, heretofore unsettled, on account of the public lands in said State, and upon the same principles of allowance and settlement as prescribed in the 'Act to settle certain accounts between the United States and the State of Alabama,' approved the 2d of March, 1855; and that he be required to include in said account the several reservations under the various treaties with the Chickasaw and Choctaw Indians within the limits of Mississippi, and allow and pay to the said State five per centum thereon, as in case of other sales, estimating the lands at the value of one dollar and twenty-five cents per acre.

"SEC. 2. *And be it further enacted,* That the Commissioner shall also state an account between the United States and each of the other States upon the same principles, and shall allow and pay to each State such amount as shall thus be found due, estimating all lands and permanent reservations at one dollar and twenty-five cents per acre."

The question is, "In stating said account, is any deduction from or set-off against the amount of the two per cent. of the net proceeds of the sales of the public lands lying within the State of Illinois to be made or allowed in diminution of the full payment to said State of that amount, as shown by a computation of such percentage upon the net proceeds of said lands as ascertained by the Commissioner of the General Land-Office?" The Comptroller adds that, "By a report of said Commisssioner, made to this office under date of March 17, 1864, it appears that the amount of such per cent. to be paid to the State of Illinois under said act of March 3, 1857, if no deduction or set-off be allowed or made, is \$475,163.55. As, however, the original act of April 18, 1818, for the admission of Illinois into the Union, provides that this two per cent. should be 'disbursed under the direction of Congress in making roads leading to the State,' the question arises whether, in stating the aforesaid account for payment, a deduction from or set-off against the amount of the same should be made by reason of expenditures which may have been made by the United States in or toward 'roads leading to said State,' or for any other purpose incident thereto."

The act to settle certain accounts between the United

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States and the State of Alabama, referred to in the act of March 3, 1857, above cited, was essentially the same in its provisions as the act of 1857, except that it did not provide for the rate at which the lands of the Indian reservations should be estimated. But it is noticeable that neither the act of 1855 in relation to Alabama, nor the act of 1857 relating to Mississippi, contained any express provision that the two per cent. which was originally reserved for the purpose of constructing roads leading to those States, should be paid over to the States respectively, because this had already been expressly provided by the 16th and 17th sections of the statute approved September 4, 1841, (5 Stat., 457.) No act expressly relinquishing to the State of Illinois the two per cent. fund had been passed by Congress at the time of the passage of the act of 1857. If, therefore, the authority to the Commissioner of the Land-Office to state an account between the United States and each of the other States, upon the same principles as applied to the State of Mississippi, would authorize the statement of such an account by crediting to the State of Illinois the whole of the fund of the two per cent. and without regard to expenditures previously made by the United States chargeable upon that fund, the same rule would be applicable to each of the other States, no matter how large an amount had been already expended for the purpose for which the two per cent. fund was reserved, and expressly ordered to be replaced out of that fund by the acts providing for the expenditure. The equities applicable to the States of Missouri, Illinois, Indiana, and Ohio, respectively, might be very different, as either of them might have received much, little, or no benefit from the expenditure which was to be replaced out of the two per cent. fund of either State, and yet the construction of the language of the statute of 1857, which is applied alike to all of them, must be the same. The statute requires an account to be stated between the United States and each of them *upon the same principles*.

Upon full consideration, I do not find sufficient reason to believe that the act of 1857 had any other object in view than to extend the computation of five per cent. of the sales of public lands which were reserved for the benefit of the

Illinois Two Per Cent. Fund.

State of Mississippi, to the lands contained in the Indian reservations, the relinquishment of the two per cent. having been already provided by previous legislation; and I am also of opinion that the 2d section of the same statute was only designed to give to each of the other States the benefit of an account to be stated between the United States and them respectively, which would include upon the same footing as lands sold any Indian reservations within those States.

In looking into the history of the act, I find no trace of any suggestion that Congress should then give up to the States of Missouri, Illinois, Indiana, or Ohio, the two per cent. fund which had been reserved by Congress upon the trust to expend it upon roads leading to those States. And as it was true that Congress had expended several millions of dollars upon the Cumberland road, and by successive acts had provided that a much greater amount of the money thus appropriated than the whole amount of the two per cent. fund derived from the sales of lands in all those States should be replaced from the two per cent. fund, the trust which Congress had assumed in regard to the two per cent. fund derived from the sales of lands in those States was, therefore, a trust executed, so far as the fund now under consideration is concerned.

The whole of the national road lying within the limits of the State of Illinois had been, by the act of May 9, 1856, (11 Stat., 7,) transferred and surrendered to the State of Illinois. If it were the intention of Congress, by the act of 1857, to provide for the payment to the States of Missouri, Illinois, Indiana, and Ohio, of the large sums of money which Congress had appropriated to the construction of the Cumberland road, with the express provision that they were to be replaced out of the two per cent. fund, and which so largely exceeded the whole amount received by Congress to the credit of that fund, I should certainly have supposed that such a purpose would have been indicated in the report of the committee, in the debates in Congress, or by some clear and unequivocal language of the act itself. I can find no evidence of any contemporaneous opinion that the meaning which is now claimed for the act of 1857, by the State of Illinois, was then attributed to it. On the contrary, the act

Illinois Two Per Cent. Fund.

of February 28, 1859, (11 Stat., 388,) was passed for the purpose of relinquishing to the State of Missouri the two per cent. fund derived from the sales of lands in that State. That statute was in these words :

"Be it enacted, &c., That the assent of Congress be, and the same is hereby, given to the act of the legislature of the State of Missouri, entitled 'An act supplemental to an act to amend "An act to secure the completion of certain railroads in this State, and for other purposes,"' approved on the 19th day of November, 1857, appropriating the two per centum of the net proceeds of sales of public lands in said State, reserved by existing laws to be expended under the direction of Congress, but hereby relinquished to that State; and that the proper accounting officers of the Government are hereby authorized and required to audit and pay the accounts for the same, as in the case of the three per centum land fund of said State."

In the full debate upon the passage of this act, which is found reported in the Congressional Globe, 35th Congress, second sess., pt. 1, pp. 806, 809, there is no suggestion or claim either by the advocates of the act on the part of Missouri, or by the representatives, in either branch of Congress, of Illinois, Indiana, or Ohio, that the act of 1857 had any such force as is now sought to be given to it. The passage of the act of 1859 was supported upon the ground that Congress had abandoned the whole policy of the construction of a road leading to the State of Missouri; that the Cumberland road had never been constructed to that State, and that the State had derived no benefit from it. But the distinction was broadly drawn in the debate between the condition of Missouri in this respect and the condition of Illinois, Indiana, and Ohio; and the act, as will be seen, recites that the two per centum of the net proceeds of the sales of public lands in Missouri are reserved by existing laws to be expended under the direction of Congress, but are "hereby relinquished to that State." The act of the legislature of the State of Missouri, to which assent is thereby given, was approved on the 19th day of November, 1857, after the passage of the act of March 3, 1857, and the statute of 1859 seems to me to contain a legislative declaration that the two per cent. fund had not at that time been relinquished to the State of Missouri.

Illinois Two Per Cent. Fund.

There seems to me strong reason to believe that the expenditure in the States of Ohio, Indiana, and Illinois, of a much greater amount than the whole of the two per cent. fund received from the sales of lands in those States, in the construction of the Cumberland road, followed by a relinquishment and transfer to the States of the whole property of the United States in that road, was regarded by Congress and those States as a complete execution of the trust which Congress had assumed in relation to that fund, and a complete settlement between the United States and those States respectively of the expenditure of that fund.

I am, therefore, of opinion that the whole duty of the Commissioner of the Land-Office will be discharged under the act of 1857, by stating the account of the five per cent. of sales of public lands in Illinois, and crediting the amount of the three per cent. already paid to that State, and the whole amount of the two per cent. reserved up to the passage of that act, including in such computation all the Indian reservations at the rate of one dollar and a quarter per acre.

There may be equities of the State of Illinois different from those which apply to Indiana or Ohio. Whether such equities would justify or require any payment or relinquishment of the two per cent. fund, or any part of it, to Illinois, upon the grounds upon which the statute of 1859 in favor of Missouri was enacted, is a question for Congress to determine. But upon a review of all the existing legislation I cannot find that there has been a sufficiently clear declaration of the purpose of Congress to relinquish the two per cent. fund to the State of Illinois, to justify the Treasury Department to pay that State the amount originally retained on account of that fund from the sales of public lands within that State.

In stating an account between the United States and the State of Mississippi for the purpose of ascertaining what sum or sums of money were, in 1857, due to said State, theretofore unsettled on account of the public lands in said State, and including therein the Indian reservation, it does not appear that any expenditure had ever been made by Congress of the two per cent. fund of that State in building a road to it. If

Fur-bearing Animals in Alaska.

no such expenditure had been made, there would, therefore, be no account chargeable to the State against that fund. But when the act provides that an account shall be stated between the United States and each of the other States *upon the same principles*, and the circumstances of other States are found to be so far different that an expenditure intended to be replaced from the two per cent. fund, and ordered to be replaced from it, had already been actually incurred to an amount exceeding the whole of the fund in another State, it must be considered what is meant by the phrase "upon the same principles." If by that expression it is only meant that the Indian reservations are to be computed and paid for as if they had been lands sold at the rate of one dollar and a quarter per acre, there is a sufficient subject-matter to which it can be applied. To go further, and to treat a payment made on account of the fund, and expressly ordered to be replaced by it, which exceeded the whole amount of the fund, as something still unsettled, in the absence of any direct proof that Congress contemplated such a result, would seem to me to attempt by ingenious construction to give a force to the act not to be justified in a matter of such importance.

Very respectfully,

E. R. HOAR.

Hon. GEO. S. BOUTWELL,
Secretary of the Treasury.

FUR-BEARING ANIMALS IN ALASKA.

The provisions of the act of July 1, 1870, to prevent the extermination of fur-bearing animals in Alaska, considered and construed with reference to the authority and duty of the Secretary of the Treasury touching the time and mode of executing the same, so far as they relate to the granting of a lease of the right to engage in the business of taking fur-seals on the islands of St. Paul and St. George, and the parties to whom such lease may be granted by him.

DEPARTMENT OF JUSTICE,

July 6, 1870.

SIR: Your letter of the 2d instant asking my opinion upon the construction of an act approved on the 1st instant, entitled "An act to prevent the extermination of fur-bearing ani-

Fur-bearing Animals in Alaska.

mals in Alaska," has been received. You say that you desire my opinion upon two points, viz:

"First. Does the bill so designate the 'Alaska Commercial Company' as to give them precedence or preference of any sort; and, if so, what?

"Second. Is it the duty of the Secretary of the Treasury to give public notice of the passage of the bill, and of his authority under it, inviting proposals; or, in case such notice is not given, may he delay action until other parties, if any there be, shall have an opportunity to make proposals to the Department?"

I have heard an extended argument from counsel representing the Alaska Commercial Company, and other parties in interest, and they have also submitted to me a written argument addressed to you, which I return with the papers.

By the provisions of the act in question, you are required, *immediately after its passage*, to "lease, for the rental mentioned in section 6 of this act, to proper and responsible parties, to the best advantage of the United States, having due regard to the interests of the Government, the native inhabitants, the parties heretofore engaged in the trade, and the protection of the seal fisheries, for a term of twenty years from the 1st day of May, 1870, the right to engage in the business of taking fur-seals on the islands of Saint Paul and Saint George," upon certain conditions thereafter prescribed. "And in making said lease the Secretary of the Treasury shall have due regard to the preservation of the seal fur-trade of said islands, and the comfort, maintenance, and education of the natives thereof."

You state that the Alaska Commercial Company has offered to execute a lease in conformity with the provisions of the act, and that they claim that it was understood by the committee reporting the bill, and by the two Houses of Congress, that their company was to have the preference over any other party, and that it is your duty, without delay and without public notice inviting proposals, to immediately enter into a contract with said parties.

It is apparent, in the first place, that the Alaska Commercial Company is not mentioned in the act, unless by terms of description. If you shall find that that company, composed

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exclusively, or in connection with others, "the parties heretofore engaged in the trade," then the company is referred to for some purpose; but even then the only positive provision the act contains which necessarily concerns them is, that, in making the lease, you shall have *due regard* to their interests. Certainly the act contains no direction to make the lease to this company, unless, upon due examination, you shall become satisfied that a lease to them on such terms as they are willing to accept will better satisfy the requirements of the act than a lease to any other person or company.

I find in the debate upon the act some indication that members of Congress who engaged in it expected that the lease would be made to this company. But if it had been the intention of Congress to declare that it should be made to them, it would have been very easy to say so in simple and direct terms, and require you to make immediately a lease to the Alaska Commercial Company containing such conditions and provisions as seemed to Congress to be proper. Upon the face of the act, or upon any reasonable construction that I can give it, no such intention is apparent.

You are to make a lease "immediately." But this phrase, in its legal significance, must depend upon the subject-matter to which it is applicable. I think it means no more than that you are at once to enter upon the discharge of the duty which is imposed; that you are to go about it without delay. As you are required to do an act which involves the ascertainment of various facts, and the exercise of your judgment upon them, to do this act *immediately* must mean that you shall do it as soon as, with diligence, it can be accomplished; that is, as soon as, by the adoption of proper means, you can learn the facts and form a judgment upon them.

You are to make the lease to "proper and responsible parties." I think this clearly requires you to ascertain whether the Alaska Commercial Company comes within this description, and to ascertain whether any other persons, if any should be found who would better conform to the other conditions imposed, are also proper and responsible parties.

You are to make the lease "to the best advantage of the United States." In order to know that the lease which you are to execute is to the best advantage of the United States,

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you must of course ascertain whether more favorable terms for the Government than those offered by the Alaska Commercial Company could be obtained. In determining what is to the best advantage of the United States, you are to have "due regard to the interests of the Government, the native inhabitants, the parties heretofore engaged in the trade, and the protection of the seal fisheries."

It is claimed on the part of the Alaska Commercial Company that "due regard" to them as "parties heretofore engaged in the trade," cannot be had unless they receive the lease. But it seems to me evident that this is only one of the conditions of the problem. I think that you would have "due regard" to their interests, if you should give them the preference as far as was consistent with the other interests for which you are directed to provide. If the terms which the company offer are as favorable to the Government, to the inhabitants, and to the protection of the seal fisheries, as those which can be obtained in any other quarter, or nearly so, then under the provisions of the act they would be entitled to a preference. But if the terms which their interests lead them to offer are much less favorable, then it would seem to me that it would be more than a "due regard" to their interests to give them the lease and thereby sacrifice the other interests which you are required to protect.

Where the interests of the Government and of the natives, and of parties heretofore engaged in the trade, conflict, there is nothing in the act to determine to what extent preference is to be given to one rather than to the other. It is all left to your sound discretion to make, as soon as you have the opportunity to form a correct judgment, a lease to such parties as appear to you "proper and responsible," giving a reasonable and a due regard to all of the various interests involved.

Whether it is your duty to give public notice of the passage of the bill and of your authority under it inviting proposals, will depend upon whether such a proceeding is necessary to enable you to arrive at a just conclusion in regard to the party with whom you will contract by lease. Whether in case such notice is not given, you may delay action until other parties, if any there be, shall have an opportunity

Discharge from the Army.

to make proposals to the Department will depend also, in my opinion, upon your reasonable belief that there may be other parties with whom, on a full knowledge of all the conditions imposed, a lease could be made according to the provisions of the act on better terms than with the Alaska Commercial Company, having due regard to their interests as well as those of the Government and of the natives.

The method you shall adopt to inform yourself of the willingness of other parties to make proposals seems to me to be left to your own discretion, except that you are to go about it immediately, and interpose no delay except what is reasonably necessary for the faithful execution of your trust.

These expressions of my opinion seem to me to contain a sufficient answer to the questions you have submitted.

Very respectfully,

E. R. HOAR.

Hon. GEORGE S. BOUTWELL,

Secretary of the Treasury.

DISCHARGE FROM THE ARMY.

A party having enlisted as a volunteer soldier in the year 1863 was, on the 18th of January, 1866, before the expiration of his term of enlistment, mustered out of service with his company at Fort Monroe, Virginia, but was not paid off, nor was his discharge certificate delivered to him, until he reached Augusta, Maine, on the 25th of January, 1866, to which latter place he had been transported with his company under the orders and control of the military authorities: Held that he was not discharged from the service within the meaning of section 2 of the act of August 4, 1854, until the 25th of January.

The "muster-out" of a volunteer soldier cannot be viewed as in itself or by itself a discharge from service; and he is not to be regarded as discharged until he is released from military control and from subjection to the orders of his superior officers.

DEPARTMENT OF JUSTICE,

July 6, 1870.

SIR: Your letter of the 24th of January last submits to me for an opinion the case of Sergeant James Kierran.

In October, 1863, Kierran enlisted in the Eighth Regiment of Maine Volunteer Infantry, and, on the 18th of January, 1866, before the expiration of his term of enlistment, was mus-

Discharge from the Army.

tered out of service with his company, at Fortress Monroe, Virginia, but he was not paid off, nor was his discharge certificate delivered to him, until he reached Augusta, Maine, on the 25th of January, 1866, whither he had been transported with his company by direction and under the orders and control of the military authorities. On the 21st of February, 1866, he enlisted in the battalion of engineers, in which he is now serving.

Section 2 of the act of August 4, 1854, (10 Stat., 575,) declares that "every soldier who, having been honorably discharged from the service of the United States, shall, within one month thereafter, re-enlist, shall be entitled to two dollars per month in addition to the ordinary pay of his grade for the first period of five years after the expiration of his previous enlistment," &c. And by the 2d section of the act of March 2, 1867, (14 Stat., 435,) it is provided that "in all matters relating to pay, allowances, &c., of officers and soldiers of the Army of the United States, the same rules and regulations shall apply, without distinction, for such time as they may be or have been in the service, alike to those who belong permanently to that service and to those who, as volunteers, may be or have been commissioned or mustered into the military service under the laws of the United States for a limited period," &c.

It seems to be assumed that, under the enactments just quoted, a volunteer soldier who has re-enlisted in the Regular Army within one month after his previous discharge from service, is entitled to the additional compensation provided by the act of 1854; and the "point at issue" in the case under consideration appears to be whether, in view of the circumstances stated, the discharge of Sergeant Kierran from the volunteer service is, in contemplation of the act last mentioned, to be regarded as dating from the 18th of January, 1866, when he was mustered out, or from the 25th of January, 1866, when he was finally paid off and his discharge certificate delivered to him.

The 11th article of war, (2 Stat., 361,) declares that a non-commissioned officer or soldier "shall not be dismissed the service without a discharge in writing." This provision, at the period referred to, applied as well to volunteers as to

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regulars, they being equally subject to the articles of war. The "muster out" of volunteer and militia troops cannot be viewed as in itself or by itself a discharge of such troops from service. It is only a preliminary requirement to their discharge, which has been established by regulation for the purpose of verifying the rolls and of guarding against abuses. See Army Regulations, edition of 1861, p. 496; ibid., edition of 1863, p. 482. A volunteer soldier, notwithstanding his muster out, is not to be regarded as discharged until he is released from military control and from subjection to the orders of his superior officers.

In Sergeant Kierran's case this, as it would seem, did not take place until the 25th of January, 1866, when his discharge certificate was given him, and accordingly not until that time can he be deemed to have been honorably "discharged," within the meaning of the act of August 4, 1854.

Very respectfully, your obedient servant,

E. R. HOAR.

Hon. Wm. W. BELKNAP,
Secretary of War.

CASE OF THE "MORNING LIGHT."

A steamboat belonging to a resident of Wheeling, Virginia, (now West Virginia,) was taken by her owner before the rebellion to New Orleans, Louisiana, where he remained with her until May, 1861, when he left her in charge of an agent and returned to the former place; she was subsequently captured by a United States gun-boat on Red River, brought back to New Orleans, then in possession of the United States forces, and turned over to and used by the military authorities there until November, 1862, when she was restored to her owner, who now claims compensation for her use under the joint resolution of December 23, 1869: Held that, waiving the question whether the boat was not at the time of her capture to be regarded as enemies' property, the claim is not within the purview of that enactment.

The proviso of that resolution is to be construed as if it read, "provided that such steamboats or other vessels were in the insurrectionary districts by virtue of an authority specially appropriate to vessels of the United States within districts in insurrection," &c.

There is nothing in the resolution which warrants its extension to vessels in insurrectionary districts under a charter or contract between private

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persons, whether made before the rebellion or afterward, or made between rebels, enemies, or loyal persons, such as is ordinarily required for the hiring of vessels, but not such as was specially appropriate for vessels entering the insurrectionary districts.

DEPARTMENT OF JUSTICE,

July 7, 1870.

SIR: Your letter of the 27th ultimo submits to me for an opinion a question of law stated in a letter of the Second Comptroller to you of the 24th ultimo, relating to the steam-boat "Morning Light." I understand the facts to be as follows:

Before the rebellion, William Dillon, a citizen of the United States, resident at Wheeling, Virginia, now West Virginia, built a steamboat at Wheeling, and went with her to the port of New Orleans, Louisiana, where he engaged in the carrying trade. He continued using the boat in this business on the Mississippi River and its tributaries until May 4, 1861, when he left the steamboat at New Orleans in charge of an agent, and returned to his home at Wheeling, where he remained until the steamboat was restored to him as hereinafter mentioned. The boat was used after the breaking out of the rebellion by his agent, or by other persons to whom his agent, without his authority, gave control over her, in the same manner as before, and remained within the territorial limits of the rebellion until May, 1862, when, after the capture of New Orleans by the Army and Navy of the United States, the steamboat was captured on the Red River by a gun-boat of the United States, carried to New Orleans, and taken and used by the military forces of the United States there until November 31, 1862, when Major General Benjamin F. Butler, at that time commanding the military forces in New Orleans, restored the "Morning Light" to her owner, who had theretofore been loyal, and has remained loyal ever since.

The owner claims to be paid for the use of his boat while she was in the possession of the military forces of the United States at New Orleans and was used by them; and the question of law on which you ask my opinion is, whether this claim can be adjusted and paid under the joint resolution re-

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lating to steamboats and other vessels owned in the loyal States, approved December 23, 1869.

It is suggested in behalf of the claimant, that the claim originated when the boat came into the possession of the military forces of the United States; that she went lawfully to New Orleans before the rebellion, and was lawfully engaged in commerce there; that after the breaking out of the rebellion, the establishment of the blockade, and the passage of the non-intercourse laws, made it impossible and, in fact, unlawful for the owner to obtain a return of the boat, to say nothing of the resistance to any attempt to remove the boat that would have been made by the rebel authorities; and that, therefore, the boat was in the insurrectionary district by proper authority—that is, by authority of the laws of the United States, and that the claimant is within all the other conditions of the resolution.

Waiving the question whether this boat was not at the time of her capture to be regarded as enemies' property, inasmuch as she was engaged in the internal commerce of the States then in insurrection without the express license or permission of the United States, I do not think the claim is within the purview of the joint resolution.

The proviso of that resolution requires, in addition to the loyalty of the claimant and his residence in a loyal State, that the steamboat or other vessel be in the insurrectionary district by proper authority, viz., charter, contract, impressment, or in conformity with rules or regulations established by the Secretary of the Treasury and approved by the President of the United States. It seems to me that this proviso must be construed as if it read: *Provided*, That such steamboats or other vessels were in the insurrectionary districts by virtue of an authority specially appropriate to vessels of the United States within districts in insurrection, &c. There is no indication in the resolution of any intention to legislate in reference to vessels that went into the insurrectionary districts before the rebellion and remained there after it began, or to distinguish between such vessels as went and remained there without a charter or contract, and such as went and remained there under a charter or contract.

The rules and regulations mentioned are plainly those au-

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thorized by the proviso of the 5th section of the act of July 13, 1861, (12 Stat., 257,) and by other acts of Congress relating to the rebellion.

The impressment mentioned in the resolution must mean an impressment by authority of the United States; and the words "charter" and "contract," from the context, must mean a charter or contract executed by an authority such as was proper or requisite to enable a vessel lawfully to go into an insurrectionary district.

The act of February 21, 1867, (14 Stat., 397,) in effect prohibited a settlement of any claim for the taking of personal property by the military authorities of the United States, where such claim originated during the war for the suppression of the southern rebellion in a State or part of a State declared to be in insurrection by the proclamation of the President; and it has been held that the taking and using of a steamboat in the manner in which this boat was taken and used, were an appropriation of the steamboat within the meaning of this act; and that the claim of the owners of the boat to be paid for such use originated in the State or part of the State in which the boat was so taken and used.

The joint resolution of December 23, 1869, was passed to provide for the settlement of claims for steamboats and vessels so taken and used when they were owned by loyal citizens resident in loyal States and had been brought within the insurrectionary districts by the permission or under the authority of the United States. The enumeration after the *videlicet* of the resolution is of all the methods whereby a vessel could lawfully be authorized to proceed from a loyal State into the insurrectionary districts after the breaking out of the rebellion, the establishment of the blockade, and the passage of the non-intercourse laws.

I have read the discussion had upon this resolution in the Senate in the first session of the Forty-first Congress, and the criticism therein made upon the language of it; but the construction I have given seems to me the only one that will give force to all the words of the resolution.

The vessel, if not in the insurrectionary district by impressment or in conformity with the rules and regulations named, to be there by proper authority must be there under a char-

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ter or contract properly authorized for vessels in insurrectionary districts, and not under the ordinary charter or contract for the hiring of vessels. The United States alone could authorize the making of any such charter or contract. To extend the resolution to vessels in the insurrectionary districts under a charter or contract between private persons, whether made before the rebellion or afterward, or made between rebels, enemies, or loyal persons, such as is ordinarily required for the hiring of vessels, but not such as was specially appropriate for vessels entering the insurrectionary districts, seems to me unwarranted.

Very respectfully,

E. R. HOAR.

Hon. GEO. S. BOUTWELL,
Secretary of the Treasury.

OPINIONS
OR
HON. AMOS T. AKERMAN, OF GEORGIA.

*APPOINTED JUNE 23, 1870.

RAILROADS IN THE INDIAN TERRITORY.

As between the Missouri, Kansas and Texas Railroad Company and the Missouri River, Fort Scott and Gulf Railroad Company, the right, under the acts of Congress and the treaties with the Indians, to construct a railroad through the Indian Territory, from the southern boundary of Kansas, belongs to the former company.

DEPARTMENT OF JUSTICE,
July 21, 1870.

SIR : The question which you have submitted to me is this: Which of the two railroad companies, the Missouri, Kansas and Texas Railroad Company, formerly known as the "Union Pacific Railroad Company, Southern Branch," or the Missouri River, Fort Scott and Gulf Railroad Company, formerly known as the "Kansas and Neosho Valley Railroad Company," has the right, under the acts of Congress and the treaties with the Indians, to construct a railroad through the Indian Territory southward from the southern boundary of Kansas? Another company, which is referred to in the acts of Congress, to wit, the Leavenworth, Lawrence and Fort Gibson Railroad Company, does not appear in this competition, for no claim is set up that it has complied with the conditions prescribed in the acts of Congress.

Confining my attention to the other two companies, and assuming that but one of them has the right to extend its

* NOTE.—The commission of Mr. Akerman as Attorney-General bears date June 23, 1870, but he did not qualify and enter upon the duties of the office until July 8, 1870; his predecessor, Judge Hoar, remaining in and discharging the duties of the office up to the last-mentioned date.

Railroads in the Indian Territory.

road through the Indian Territory—a point which I consider as decided by the Secretary of the Interior in his communication to the President of May 21, 1870, and the President's approval thereof under date of May 23, 1870—I will proceed to the consideration of the acts and treaties bearing upon the subject. It is settled by the opinion of the Secretary of the Interior and the decision of the President, in which I fully concur, that the one of these two competing roads which first reached the southern line of Kansas at a proper point, has the sole right to go through the Indian Territory. The Kansas and Neosho Valley reached this line first; but did it reach the line at a proper point?

It seems to have been the intention of Congress that both roads should reach the southern boundary of Kansas at or near where the Neosho River touches the said boundary. The act of July 26, 1866, (14 Stat., 289,) granting aid to the Southern Branch road, defines its line as "down the valley of the Neosho River to the southern line of the State of Kansas." The certificate of incorporation of the same road defines its line as running "*via* Clark's Creek and Neosho River to a point at or near where the southern boundary-line of the State of Kansas crosses the said Neosho River." The act of July 25, 1866, (14 Stat., 236,) granting aid to the Kansas and Neosho Valley Company, provides in the 11th section for the consolidation of other companies with it, "after its road shall be located to the valley of the Neosho River." The only doubt upon this point arises from the language of the 1st section of this act, which seems to confine the latter company to the eastern tier of counties in Kansas.

The Kansas and Neosho Valley Company contend that if it had crossed the Neosho River it would have transgressed the limits thus prescribed. This argument overlooks the material fact that there is a strip of land a mile and a half wide, called the Cherokee strip, lying within what is geographically known as the State of Kansas, and against its southern boundary, which is not properly included within any county of that State. By the act of July 29, 1861, admitting Kansas into the Union, it was provided that "all such territory should constitute no part of the State of Kansas until the Indian tribes should signify their assent to be included within said

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State." This strip belongs to the Cherokees, who have given no such assent. By crossing the Neosho River in this strip the Kansas and Neosho Valley Company could have joined the Southern Branch road at or near the southern boundary of Kansas, and yet have confined itself to the eastern tier of counties throughout the lawful extent of that tier. I also have information that at the date of the act of Congress of July 25, 1866, the whole of Cherokee County was Indian land under the same regulations as the "strip," a fact which gave the company a wider range in the selection of a crossing-place. To have required the Southern Branch Company to cross that river to the eastern side for the sole purpose of a junction with the other road, to recross immediately in its general direction toward Preston, in Texas, would have been an expensive and useless exaction, which it is hardly likely that Congress intended.

If it be true that Congress has offered privileges which cannot be enjoyed without a departure from the limits prescribed in a former act, or in a former part of the same act, it may be strongly argued that the offer repeals the restriction as to limits. It is not supposable that Congress, in tendering to the successful competitor the privilege of crossing the Indian Territory, meant to make an illusory offer.

If literal compliance with the provisions of the act were impossible, the competitors should each have gone as near as possible to literal compliance. This the Southern Branch road seems to have done, and this the Kansas and Neosho Valley road seems not to have done. The former road reached the southern boundary of Kansas at a point only one mile west of the river, and as near to the river as the nature of the country would permit a road to be built. The latter road reached the southern boundary line of Kansas at a point sixteen miles east of the river without ever having touched the valley of the river, unless the term "valley" shall be interpreted in a sense altogether too loose and too extensive for a rational application to the site of a railroad.

The latter company claims that the Government is bound by the location of its road, because a map showing the location was filed with the Secretary of the Interior on the 5th day of January, 1869, as required by the 4th section of the

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act of July 25, 1866. This argument is met by the fact that the former company also filed a map of its line with the Secretary of the Interior at an earlier period, and by the further important fact that the Kansas and Neosho Valley Company has not adhered, in building the road, to the line designated in its map so filed, but has deviated in an easterly direction so as to strike the southern boundary of Kansas four and a half miles east of the point indicated upon the map filed.

The considerations in favor of the Southern Branch Company are strengthened by the fact that this company touched the southern line of Kansas against that part of the Indian Territory occupied by the Cherokees, with whom there is a treaty authorizing the construction of a railroad across their lands. The other company reached the southern line of Kansas at a point against the territory of the Quapaws, with whom there is no such treaty. In view of the well-known purpose of the Government to protect the Indian Territory from unauthorized entrance by whites, a company which has built its road to the boundary of a tribe into whose territory no such entrance has been granted, stands before the Government as a litigant not to be favored.

As the result of my investigation, I am of the opinion that the right to build the road through the Indian Territory to Texas belongs to the Southern Branch road, now known as the Missouri, Kansas and Texas road.

Very respectfully, your obedient servant,

A. T. AKERMAN.

The PRESIDENT.

UNEXPENDED BALANCES OF APPROPRIATIONS.

Under the provisions of the act of July 12, 1870, balances of appropriations made for the year 1869-'70, of any description, may be applied to the service of the year 1870-'71, so far as, 1st, to pay in the latter year expenses properly incurred in the former year; and, 2d, to pay dues upon contracts properly made within the former year, though such contracts be not performed till within the latter year.

Neither the 5th nor the 7th section of that act places any restriction upon the use of balances, 1st, where they are from appropriations not made in annual appropriation bills; 2d, where they are from appropriations

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not made especially for a particular fiscal year; 3d, where they are from appropriations known as permanent; and 4th, where they are from appropriations known as indefinite.

Claims allowed under the act of July 4, 1864, are not payable from appropriations made for the fiscal year 1870-'71, none of those appropriations seeming to be for that object.

Appropriations which, in terms, are for the service of the year 1870-'71, cannot be used for any other purpose than the payment of the expenses incurred for the service of that year.

Nor can money be taken, by counter requisitions, from such appropriations to settle old accounts.

Permanent appropriations are those made for an unlimited period; indefinite appropriations are those in which no amount is named.

DEPARTMENT OF JUSTICE,

July 27, 1870.

SIR: I have received your communication of the 23d instant touching the proper construction of the act making appropriations for the legislative, executive, and judicial expenses of the current fiscal year, approved July 12, 1870, (16 Stat. 230.)

I will proceed to state your questions, with my answers thereto.

First. "Can balances of appropriations made for the fiscal year 1869-'70 be applied to the service of the year 1870-'71?"

The sections of the act which should be considered in answering this question are the 5th, 6th, and 7th.

Section 5 is in these words: "All balances of appropriations contained in the annual appropriation bills, and made specifically for the service of any fiscal year, and remaining unexpended at the expiration of such fiscal year, shall only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year, and such balances not needed for the said purposes shall be carried to the surplus fund: *Provided*, That this section shall not apply to appropriations known as permanent or indefinite appropriations."

Section 6 provides that all balances of appropriations that have not been drawn against for two years since the last appropriation shall be carried into the general Treasury, unless they shall be required to pay accounts pending in the office of the Auditor; but appropriations for the payment of the

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public debt, or "to which Congress may have given a longer duration of law," are reserved from the operation of this section.

Section 7 provides "that it shall not be lawful for any Department of the Government to expend in any one fiscal year any sum in excess of appropriations made by Congress for that fiscal year, or to involve the Government in any contract for the future payment of money in excess of such appropriations."

The examination of section 5 will show that, to bring a balance within its provisions, it must remain, first, from an appropriation contained in the annual appropriation bills; second, from an appropriation made "specifically" for the service of a particular fiscal year; third, that it shall not have arisen from an appropriation known as "permanent;" fourth, that it shall not have arisen from an appropriation known as "indefinite."

If the balances to which your question relates come within these four conditions, they cannot be applied to the service of the current year except to pay expenses incurred during the year 1869-'70 or to the fulfillment of the contracts made within the latter year. But if the balances do not come within all of these four conditions, they are unaffected by this section of the act.

But such balances and all balances of other appropriations are, by section 6, reserved from current expenditure and carried into the general Treasury, when they have not been drawn against for two years from the date of the last appropriation made by law, unless they shall be required in the settlement of accounts pending in the office of the Auditor. The fact that a balance has been drawn against within two years since the last appropriation, reserves it from the operation of this section, no matter how large the balance may be, or how small the amount may be which has been drawn against it.

This section is expressly made inapplicable to appropriations for the payment of the interest or principal of the public debt, and to appropriations "to which Congress may have given a longer duration of law."

To what class of appropriations does this last clause refer? The most satisfactory answer is that it refers to appropri-

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tions made for a longer period than two years, the only expression of time in that section with which it can be compared, the purpose of Congress apparently having been that appropriations unexpended and unnoticed by being drawn against for the space of two years should go into the general Treasury, unless at the time of the appropriation the expenditure was not expected to be complete within two years.

A narrow and literal construction of the 7th section would make the 5th and 6th sections utterly worthless. Presuming that Congress intended all of these sections to stand together and have effect, I am brought to the conclusion that the 7th section does not prohibit the expenditure for proper objects of such balances as do not fall within the prohibitions of the 5th and 6th sections.

Recurring, then, to your first question, I am of opinion that balances of appropriations made for the year 1869-'70 of any description—even if contained in annual appropriation bills and made specifically for that fiscal year—may be applied to the service of the year 1870-'71, so far as, first, to pay in the current year expenses properly incurred in the former year, and, second, to pay dues upon contracts properly made within the former year, even if the contracts be not performed till within the latter or current year. This is plainly allowed (by express exception to prohibitions) in the very terms of section 5.

Further, I am of opinion that neither the 5th nor the 7th section of that act places any restriction upon the use of balances, first, where they are from appropriations not made in annual appropriation bills; second, where they are from appropriations not made specifically for a particular fiscal year; third, where they are from appropriations known as permanent; and, fourth, where they are from appropriations known as indefinite. The proper use of such balances is to be determined by other provisions of law than those contained in sections 5, 6, and 7, of the act under consideration. Indeed section 6 lays no restriction whatever upon the manner of using balances, but merely prescribes the time and manner of their transfer to the surplus fund.

Second, "Can claims allowed under the act of July 4, 1864, 'to restrict the jurisdiction of the Court of Claims,' &c.,

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(13 Stat., 381,) be paid from the appropriations for the fiscal year 1870-'71?"

I know no principle which would authorize the payment of these claims from such appropriations; for none of the appropriations for that year seem to be for that object.

Third. "Can the appropriations for 1870-'71 be used for any purposes except the actual expenses of the service for the fiscal year?"

I think not. This answer is on the supposition that you refer to such appropriations as by the terms of the act are for the service of this year. Congress has the right to limit its appropriations to particular times as well as to particular objects, and when it has clearly done so, its will expressed in the law should be implicitly followed. This view will not forbid the use in the next year of balances remaining from such appropriations at the end of this year in the payment of expenses incurred and contracts made within this year, as authorized in section 5.

Fourth. "Can money called for by counter requisitions to settle old accounts be taken from the appropriations for the current fiscal year?"

In the appropriations for the current year I find none for such objects, and, therefore, answer the question in the negative.

Fifth. "What are *permanent* or *indefinite* appropriations?"

Knowing the difficulty of undertaking an exhaustive definition of such terms, I will, for your present purpose, adopt the language which has been used in legislation, and define *permanent* appropriations as those for an unlimited period, and *indefinite* appropriations as those in which no amount is named.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. Wm. W. BELKNAP,

Secretary of War.

Fur-Seals in Alaska.

FUR-SEALS IN ALASKA.

Proposals for a lease of the exclusive right to take fur-seals upon certain islands off the coast of Alaska, agreeably to the provisions of the act of July 1, 1870, having been solicited by the Secretary of the Treasury, a party, besides other considerations, offered to pay a stated amount on each skin in addition to the revenue tax specified in that act, and also a stated amount for each gallon of oil obtained from the seals: *Held* that those parts of the bid are in conformity to the statute, and would be binding if incorporated in the lease.

DEPARTMENT OF JUSTICE,

July 29, 1870.

SIR: The questions presented in your communication of the 26th instant arise upon the following facts:

The act of July 1, 1870, entitled "An act to prevent the extermination of fur-bearing animals in Alaska," provides in the 4th section that "the Secretary of the Treasury shall lease, for the rental mentioned in section 6 of this act, to proper and responsible parties, to the best advantage of the United States, having due regard to the interests of the Government, the native inhabitants, the parties heretofore engaged in trade, and the protection of the seal fisheries, for a term of twenty years from the 1st day of May, 1870, the right to engage in the business of taking fur-seals on the islands of Saint Paul and Saint George, and to send a vessel or vessels to said islands for the skins of such seals, giving to the lessee or lessees of said islands a lease, duly executed, in duplicate, not transferable, and taking from the lessee or lessees of said islands a bond, with sufficient sureties, in a sum not less than \$500,000, conditional for the faithful observance of all the laws and requirements of Congress, and of the regulations of the Secretary of the Treasury touching the subject-matter of taking fur-seals, and disposing of the same, and for the payment of all taxes and dues accruing to the United States connected therewith."

Section 6 provides, "That the annual rental to be reserved by said lease shall not be less than \$50,000 per annum, to be secured by deposit of United States bonds to that amount, and in addition thereto a revenue tax or duty of \$2 is hereby

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laid upon each fur-seal skin taken and shipped from said islands during the continuance of such lease, to be paid into the Treasury of the United States; and the Secretary of the Treasury is hereby empowered and authorized to make all needful rules and regulations for the collection and payment of the same," &c.

On the 8th day of July, 1870, the Secretary of the Treasury advertised for sealed proposals for the exclusive right to take fur-seals upon said islands agreeably to the provisions of this act. Among the proposals is that of Louis Goldstone, as the agent of certain-named parties, offering to pay for the lease, over and above the annual rental of \$50,000, and the revenue tax or duty on each fur-seal skin taken and shipped from said islands, a bonus of \$100,000, to be paid in annual installments of \$5,000 for each and every year of said lease; also, a bonus of 62½ cents apiece on the skins that shall be taken and shipped of such fur-seals as may be killed under the provisions of the 3d section of said act; also, for such oil as may be made from the carcasses of such seals as shall be killed the sum of 55 cents per gallon. The other parts of his proposal are unimportant in the present inquiry.

You desire my opinion upon the question whether "those parts of the bid made by Mr. Goldstone, in which he offers to pay 62½ cents upon each skin in addition to the \$2 specified in the act, and 55 cents per gallon for each gallon of oil taken from the seals, are in conformity to law."

It is my opinion that those parts of the bid are in conformity to law, and will be binding upon Mr. Goldstone and the parties whom he represents when incorporated in the lease which shall be executed in pursuance of the act.

Section 6 fixes the annual rental at a minimum of \$50,000, and also prescribes a revenue tax or duty of \$2 upon each fur-seal skin taken and shipped. Section 4 provides that the lease shall be for the rental mentioned in section 6; but also that it shall be "to the best advantage of the United States," and shall be made with "due regard to the interests of the Government." It also requires from the lessees a large bond conditioned, among other things, "for the payment of all taxes and dues accruing to the United States" in connection with the subject-matter. There is no valuable significance

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in the words, "to the best advantage of the United States," unless the Secretary be at liberty to stipulate for the most money that he can get from the lessees for the privilege. The words, "having due regard to the interests of the Government," sufficiently provide for all other interests of the United States as proprietor and political sovereign of the islands, as regulator of commerce, and in every other relation which the Government sustains to those islands. A lease to the *best advantage* means a lease for the most valuable consideration that can be obtained.

To these obvious considerations, the competitors of Mr. Goldstone oppose the argument that the imposition, in the 6th section, of a revenue tax or duty of \$2 upon each skin, prohibits by implication a contract for any other amount on each skin, whether under the name of tax, duty, or bonus, and that the fixing of a minimum for the annual rental opens room for the stipulations "to the best advantage of the United States" by an increase of that annual rental, and in no other way.

This is an attempted application of the maxim, *the express mention of one thing implies the exclusion of another*—a rule which is often useful in ascertaining the intention of the legislature, but which yields to other and more direct significations of the legislative will. From the whole statute, it is apparent that Congress meant to give a large discretion to the Secretary of the Treasury in all matters connected with the lease. If it had been intended to confine his pursuit after "the best advantage of the United States," to an effort to get the largest possible amount of money in the form of an annual rental to be secured by a deposit of United States bonds, that object would probably have been accomplished by simple and direct language. The condition in the bond prescribed in the 4th section for the "payment of all taxes and dues accruing to the United States connected therewith," is broad enough to cover any such addition to the annual rental and the \$2 tax as the bonus of 62½ cents on each skin, and the 55 cents for each gallon of oil.

It is also argued by Mr. Goldstone's competitors that the advertisement for bids did not announce that any such proposals would be received, and, therefore, that they have been taken at a disadvantage and deprived of the opportunity of

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competing in this particular manner. There would be force in this objection if the Secretary were required by the law to advertise for bids. But such is not the fact. It was the opinion of the late Attorney-General, on a question arising under this very statute, that the Secretary had a discretion to advertise for proposals or not. The advertisement was but one mode of finding responsible parties who would take the lease on terms most advantageous to the United States. The other competitors, if so disposed, could have taken as wide a range in the character of their proposals as Mr. Goldstone, and then, considering them altogether, "having due regard to the interests of the Government, the native inhabitants, the parties heretofore engaged in trade, and the protection of the seal fisheries," as required by the statute, the Secretary of the Treasury should give the lease to that bidder whose terms, in his judgment, are "to the best advantage of the United States." And I am well satisfied that "the best advantage of the United States" may be as lawfully secured in the way proposed by Mr. Goldstone as in any other way. He engages to do all that the statute requires in terms. He also engages to do something more which is not inconsistent with the statutes, and, as I believe, is fully warranted by its letter. Even if it should be considered that the statute does not directly authorize the stipulations in question, I cannot doubt that, if incorporated in the lease upon the voluntary proposal of the lessees, they would be binding. (See 5 Pet., 115; 15 Pet., 290; 7 How., 573; 12 How., 98; 8 Wall., 358.)

In your supplementary communication of the 28th instant, you request me to consider whether Mr. Goldstone's bid is rendered invalid by the withdrawal of one of the parties whom he represented when it was originally made.

I do not think that this circumstance will affect the matter, provided that the remaining parties with whom the covenants shall be made are "proper and responsible." The nature of Mr. Goldstone's authority to act for other parties has not been made known to me. I have taken it for granted that he has authority to act for all whom he represents, either collectively or severally. The covenants which shall establish the liabilities of the parties are not in the bids, but

Pay of Naval Officers and Surveyors.

in the lease and bond. If the remaining parties, however, are not "proper and responsible," in the judgment of the Secretary of the Treasury, it is his duty to disregard the bid.

Very respectfully, your obedient servant,
A. T. AKERMAN.

Hon. GEORGE S. BOUTWELL,
Secretary of the Treasury.

PAY OF NAVAL OFFICERS AND SURVEYORS.

Section 8 of the act of July 12, 1870, placing a legislative construction upon the 5th section of the act of March 3, 1841, operates retrospectively, and gives to naval officers and surveyors a greater compensation for past services than the latter section, as expounded by the Supreme Court, gave them when the services were rendered.

The act of 1870, however, does not authorize the re-opening of accounts that have been finally adjusted; but where accounts of naval officers and surveyors, for past services rendered since the date of the act of March 3, 1841, are still open, those officers should receive the credits allowed by the act of 1870, and they should receive the same credits in their accounts for future services.

DEPARTMENT OF JUSTICE,
August 1, 1870.

SIR : I have received your letter of the 27th ultimo, inclosing a letter from the Commissioner of Customs dated the 22d ultimo, and requesting my construction of the 8th section of the act of July 12, 1870, "making appropriations for the legislative, executive, and judicial expenses of the Government for the year ending the 30th of June, 1871."

The section is in these words : "That section 5 of an act approved March 3, 1841, entitled 'An act making appropriations for the civil and diplomatic expenses of the Government for the year 1841,' shall be construed to have authorized and to authorize the naval officers and surveyors therein mentioned to receive the maximum compensation of five thousand dollars and four thousand five hundred dollars respectively, as therein named, out of any and all fees and emoluments by them received."

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The act of March 3, 1841, has been construed by the Supreme Court, in the case of *The United States vs. Walker*, (22 How., 299.) The Commissioner of Customs remarks that section 8 of the act of July 12, 1870, and the decision of the Supreme Court in the case cited, are totally at variance, and, therefore, desires you to submit to me the question: "Whether the act of Congress overrules and sets aside the decision of the Supreme Court; and, if so, from what date; or, in other words, whether it is competent for Congress to give a different construction to an act from that already given by the Supreme Court, such construction by Congress to take effect retrospectively."

No doubt this section was intended to have effect retrospectively. The words "to have authorized" relate to the past as plainly as the words "to authorize" relate to the future.

I have not undertaken to determine whether Congress has power to give a retroactive operation to its expository statutes to the injury of private parties, because this case presents no such question. Section 8 of the late act does not gainsay the correctness of the interpretation put by the Supreme Court on the act of 1841. It rather accepts that interpretation by leaving untouched the case of a collector, who stands, in the act of 1841, on the same footing as naval officers and surveyors, except that he has a larger maximum of compensation. Nor does it injuriously affect any private interests. It does nothing more in its retroactive operation than to give naval officers and surveyors a greater compensation for past services than the law, as expounded by the Supreme Court, gave them when the services were rendered. There is nothing in the Constitution or in the practice of the Government prohibiting such donations.

I do not understand the act of 1870 to require the re-opening of accounts that have been finally adjusted. On this point I refer you to the opinion of Mr. Browning, Attorney-General *ad interim*, in the case of Ezra Carter, (12 Opins., 386.) But where the accounts of naval officers and surveyors, for services rendered since the act of March 3, 1841, took effect, are still open, those officers should receive the credits

Naval Pension Fund.

allowed by the act of 1870, and in all accounts for future services the same credits should be allowed.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. GEORGE S. BOUTWELL,

Secretary of the Treasury.

NAVAL PENSION FUND.

Certain moneys having been paid into the Treasury to the credit of the naval-pension fund in pursuance of a final decree of a district court of the United States, and being thus no longer subject to the jurisdiction and control of the court: *Advised* that a subsequent decree of the court, directing a distribution of the same moneys as military salvage, should not be respected.

DEPARTMENT OF JUSTICE,

August 1, 1870.

SIR: I have received your communication of the 28th of July, 1870, requesting my opinion upon the question, whether you are authorized to issue a requisition for the transfer of certain moneys now in the Treasury, as a part of the navy-pension fund, to the prize-money fund.

It seems that the district court of the United States for the southern district of Illinois rendered decrees ordering these moneys to be paid into the Treasury of the United States to the credit of the naval-pension fund, and that the moneys were paid into the Treasury to the credit of said fund in pursuance of said decrees. At subsequent terms of said court, decrees were rendered directing the said moneys to be distributed as military salvage to the captors, and you have been requested to issue a requisition for that purpose; for such I understand to be the effect of a transfer of the moneys to the prize-money fund.

The original decrees of the court seem to have been final in the cases, and to have been carried completely into execution. The moneys thus passed out of the control of the court. It does not appear that a new trial was ordered or even moved for, or that an appeal was taken or attempted. I do not see

Foreign Missions.—Tenure of Office Act.

how the district court could again recover jurisdiction over these moneys. If there was an error in the original decrees to the injury of the captors, they were too late in asserting their rights, and their only remedy is in an application to Congress.

The statutes to which you refer me, providing that no payment shall be made from the navy-pension fund, except upon appropriation made by Congress, would not perhaps affect the case if the postulates of those who claim the transfer were true. But I think that you are not at liberty to take their postulates as true. These parties in effect allege that moneys now credited to that fund do not legally belong to it, and they seek, as they assert, not an appropriation from the fund, but the extraction from the fund of moneys which have been illegally placed in it. But, as the case is presented to me, the moneys went to that fund by the judgment of a court having jurisdiction over the subject, and the attempt to withdraw the moneys rests solely on the judgment of a court having no jurisdiction over the subject. The former judgment, therefore, should be respected, and the latter judgment should be disregarded, and the desired requisition should not be given.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. J. D. COX,

Secretary of the Interior.

FOREIGN MISSIONS.—TENURE OF OFFICE ACT.

Semblé that, in the case of a foreign mission, the holder of the office is not displaced by the appointment of a successor until the latter enters upon his duties.

Under the tenure of office acts (which, in the following opinion, are assumed to be applicable to foreign ministers and consuls, though this is regarded as doubtful upon authority, and perhaps upon principle also,) the President may suspend the incumbent of such mission until the end of the next session of the Senate, and designate some suitable person to perform the duties of the suspended officer in the mean time.

Where an officer, during the recess of the Senate, was suspended, and another person designated to fill the office till the end of the next session of the Senate, who was afterward nominated for the office during such session, but the Senate adjourned without acting upon the nomination:

Foreign Missions.—Tenure of Office Act.

Held that the failure of the Senate to confirm the nomination operated to restore the suspended officer; yet *held*, also, that the latter may be again suspended by the President for any causes which in his judgment are sufficient, without regard to the time when such causes began to exist.

DEPARTMENT OF JUSTICE,

August 4, 1870.

SIR: Your letter of the 20th of July, 1870, presents the following facts:

“Mr. George H. Yeaman was, by the advice and consent of the Senate, commissioned on the 22d day of January, A. D. 1866, to be the minister resident of the United States at Copenhagen. On the 16th day of April, 1869, Mr. C. C. Andrews was, with the advice and consent of the Senate, appointed and commissioned as the minister resident of the United States at Copenhagen. Mr. Andrews never went to Copenhagen, but was transferred to Stockholm, and on the 3d day of June, 1869, during the recess of the Senate, a commission as minister resident at that place was issued, authorizing him to hold the office in the place of General Bartlett, suspended, until the close of the next session of the Senate. On the 15th of March, 1870, Mr. Andrews was confirmed by the Senate as minister at Stockholm, and a commission was issued to him as such.

“Mr. Yeaman continued under instructions, and without interruption, to represent the United States at Copenhagen. But, in consequence of the nomination and confirmation of Mr. Andrews, a new nomination of Mr. Yeaman as minister at Copenhagen was sent to the Senate at the beginning of its late session. The Senate adjourned without acting on this nomination.”

Upon these facts you address to me the following questions:

“1. Whether the laws known as the tenure of office acts, so far as they restrain the powers of the President, are applicable to the power to appoint ambassadors, other public ministers, and consuls, conferred upon him by the Constitution, Article II, section 2.

“2. Whether Mr. Yeaman, after the adjournment of the Senate without acting on his nomination, may be regarded as the minister resident of the United States at Copenhagen, and may receive compensation therefor?

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“3. Whether, in case it is held that Mr. Yeaman is not entitled to be so regarded, Mr. Andrews having been confirmed by the Senate, first as minister to Denmark and then as minister to Sweden and Norway, is now entitled to be compensated for services as minister to both courts under the provisions of the act?

“4. Whether, in case there is a vacancy in the mission to Denmark, the President may now appoint a minister to that place?

“5. Whether, in case it is held that there is not a vacancy, the President may remove the incumbent (whether Mr. Andrews or Mr. Yeaman) and make a new appointment?”

I will first answer your second question, “Whether Mr. Yeaman, after the adjournment of the Senate without acting on his nomination, may be regarded as the minister resident of the United States at Copenhagen, and may receive compensation therefor?”

He is the minister resident now under his original appointment, unless his functions under that appointment have been lawfully terminated. His functions have not been thus terminated, unless that result has been effected by the nomination, confirmation, and commission of Mr. Andrews in April, 1869.

When there is a succession of persons in the same office, and the accession of one is to displace the other, at what point of time does the transfer take place? This question has not been adjudicated by our highest court, but it has received a careful consideration in a circuit court of the United States, and there it was held that the new commission did not vacate the old one until it was notified to the holder of the latter. (*Bonerbank vs. Morris*, Wall. C. C., 119; see also Willes' Rep., 279; 2 Hale's P. C., 25.)

This was in the case of a domestic office. In the case of a similar succession in a foreign mission, there is good reason for the rule that the holder is not displaced until the successor enters upon his duties. On account of the distance of his post from the seat of Government, any other rule would often cause serious embarrassment, notwithstanding the means of speedy communication which we owe to modern science. And this rule is well established in practice.

Foreign Missions.—Tenure of Office Act.

I need not refer you to the numerous instances in the history of our intercourse with other powers, in which a minister has remained at his foreign post for months after the nomination, confirmation, and commission of his successor, and has all the time been considered by both governments as the lawful representative of his country. The rule is recognized by the clearest implication in the act of Congress of August 18, 1856, touching the compensation of diplomatic officers, which provides that "no person shall be deemed to hold any such office after his successor shall be appointed and actually enter upon the duties of his office at his post of duty."

The various modes of terminating a diplomatic mission are well fixed in the law of nations, and the only one of them which can have any conceivable application to this case is that of *recall*; for a removal by the accession of another to the office is, in effect, a species of recall. When there is no personal or national misunderstanding, which is the present case, the retiring minister usually receives from his government a letter of recall, which he presents to the proper officer of the country in which he has served, and this ceremony formally closes his mission. In the case of Mr. Yeaman I am advised that no letter of recall was sent, so that he has never been displaced by this method. Mr. Andrews never having entered upon the duties of his office, his appointment must be regarded as inchoate, and not effectual to remove Mr. Yeaman.

I am not informed that Mr. Andrews asserts any claim to the office in question. No doubt he considers, and properly, that his commission to Copenhagen was vacated by the acceptance of the mission to Stockholm; for although it is not contrary to the law of nations for the same person to be charged with a diplomatic mission to more than one government, yet where the missions are both permanent and require different official residences, and where the appointing power intends no such multiplication of his functions, the acceptance of a new commission signifies that the former appointment is declined.

The nomination of Mr. Yeaman to the Senate for re-appointment, though wisely made under the circumstances out of abundant caution, was, in this view, unnecessary, as he was still in the office under a valid commission.

Foreign Missions.—Tenure of Office Act.

I am, therefore, of opinion that Mr. Yeaman should be regarded as the minister resident of the United States at Copenhagen, and as having been such from the time that he first entered upon the duties of the office, and his right to compensation follows of course.

These views dispose of your third and fourth questions. The first I will notice at the close of this opinion.

Your fifth question is this: "Whether, in case it is held that there is not a vacancy, the President may remove the incumbent (whether Mr. Andrews or Mr. Yeaman) and make a new appointment?"

The facts of this case do not destroy or abridge the power which the President has over civil officers under the tenure of office acts, that is, a power to suspend the incumbent until the end of the next session of the Senate, and to designate some suitable person, subject to be removed in his discretion by the designation of another, to perform the duties of the suspended officer in the mean time.

Your letter also presents the following case:

"On the 1st day of June, 1869, during the recess of the Senate, Mr. Spaulding (consul at Honolulu) was suspended, and Mr. Adamson was designated to fill the office till the end of the next session of the Senate, and was in due course nominated to the Senate as consul. The Senate adjourned without acting on the nomination."

Upon these facts you inquire—

"1. Whether the failure to confirm Mr. Adamson restores Mr. Spaulding to the consulate?"

I think it does. This answer is in conflict with the most obvious inference from the facts, that the tenure of office act, as passed in 1867, provided that if the Senate should not concur in the suspension, the suspended officer should "forthwith resume the functions of his office," and that in the amendment of April, 1869, this provision is left out. From this omission it may be plausibly argued that Congress could not have intended the failure of the Senate to sustain the suspension, to restore the suspended officer. But this argument, in my judgment, is overcome by the force of the terms used in the act. The word *suspension*, when applied to an office, never signifies a final removal of the officer, but only

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a pause in his exercise of the office. To suspend is "to debar for a time from the execution of an office." The termination of a suspension of itself restores the suspended officer.

"2. Whether in that event the President can remove Mr. Spaulding?"

I think that he can suspend him until the end of the next session of the Senate, and can designate some suitable person to perform the duties in the mean time. The restoration of Mr. Spaulding by the failure of the Senate to act upon the nomination of Mr. Adamson gives him no new rights in the office. He holds it now by the same tenure as in the previous recess, and is subject to the same sort of displacement, that is, to suspension, but not to absolute removal by the act of the President alone.

The question may arise, whether the President has a right in such cases to suspend for the original causes, or is confined to new ones. Under the tenure of office act of March, 1867, he was required to report to the Senate his reasons for suspending and the evidence, and the Senate was required directly to concur or refuse to concur in the suspension. The amended act requires no such report from the President, and no direct action by the Senate upon the suspension. As that body would not pronounce upon matters which it does not officially know, and upon which its judgment is not required by law, I do not think that its action or its failure to act upon the nomination of the proposed successor can abridge the President's freedom of judgment in the matter of suspension. He may, therefore, suspend for any causes which in his judgment are sufficient, without regard to the time when such causes began to exist.

"3. Whether the President can, in any event, fill the vacancy?"

This inquiry is substantially covered by my answer to the first.

In this opinion I have assumed that the acts known as the tenure of office acts are applicable to foreign ministers and consuls. The powerful reasoning of Attorney-General Cushing, in 1855, (7 Opins., 186,) would withdraw diplomatic and consular appointments from the operation of these statutes, and from any regulation by Congress except in the matter of compensation.

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On the other hand, while the tenure of office bill was under discussion in Congress, it was not denied that its provisions would reach diplomatic and consular officers, and a constitutional distinction between legislative power over these and over other officers does not seem to have been recognized. Attorney-General Evarts, in an official opinion, treated the act as applicable to the case of a diplomatic officer. (12 Opins., 457.)

Regarding the question, therefore, as doubtful upon authority, and perhaps upon principle also, I have chosen in this opinion to conform to what seems to be the last judgment of Congress upon the subject, reserving for a future occasion a special and thorough consideration of the grave constitutional question involved.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. HAMILTON FISH,
Secretary of State.

REVENUE OFFICERS IN INSURRECTIONARY STATES.

Where a person was appointed an assistant assessor of internal revenue in Texas, and served as such during the years 1865 and 1866, but did not take the oath of office prescribed by the act of July 2, 1862: Held that he is entitled to compensation for the services so rendered, under the provisions of section 11 of the act of July 15, 1870.

DEPARTMENT OF JUSTICE,

August 5, 1870.

SIR: Your letter of the 4th instant, with the inclosure from the Acting Commissioner of Internal Revenue, presents the following facts:

William J. Phillips was appointed and commissioned as an assistant assessor of internal revenue in Texas, and performed the duties as such during the years 1865 and 1866. He did not take the oath prescribed in the act entitled "An act to prescribe an oath of office and for other purposes," approved July 2, 1862, (12 Stat., 502.)

Mr. Phillips now claims compensation at the rate prescribed by law for the time during which he was actually employed in

Revenue Officers in Insurrectionary States.

the performance of his duties as assessor. My opinion is desired upon the question whether he is entitled to such compensation.

By the terms of the act of 1862, no officer was entitled to any of the salary or other emoluments of his office unless he had taken that oath before entering upon its duties. The act of July 15, 1870, "making appropriations for sundry civil expenses of the Government for the year ending June 30, 1871, and for other purposes," contains the following section:

"SEC. 11. *And be it further enacted,* That the Secretary of the Treasury is hereby authorized to pay such persons as were actually employed in the insurrectionary States in connection with the Treasury Department, as officers of the United States, during the year 1865 or 1866, in connection with the revenues of the Government, compensation at the rates provided by law for service rendered as such officers, and an amount sufficient for that purpose is hereby appropriated out of any money not otherwise appropriated."

I cannot conceive for what purpose this section was enacted except that of authorizing compensation to persons circumstanced as Mr. Phillips is. He was "employed in an insurrectionary State, in connection with the Treasury Department, during the years 1865 and 1866, in connection with the revenues of the Government, as an officer of the United States." The only impediment of paying him before was the prohibition in the act of 1862. Section 11 of the act of 1870 could have been passed with no object but that of removing this impediment. The debates upon it, when moved in Congress, show that such was the intention in passing it, and such, I am satisfied, is its legal effect.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. Wm. A. RICHARDSON,

Acting Secretary of the Treasury.

Tenure of Office Act.

TENURE OF OFFICE ACT.

A postmaster, having been commissioned for four years from April 20, 1867, was suspended by the President on the 5th of May, 1869, and another person designated to perform the duties of the office, who, at the ensuing session of the Senate, was nominated for the place, but was rejected by the Senate on the 5th of July, 1870, too late for the President to make another nomination at that session: *Held* that as the term of the suspension ended with the session of the Senate, without the removal of the suspended officer, or the appointment of a successor, by and with the advice and consent of the Senate, he thereby became reinstated in the office under his unexpired commission.

A suspension, in its very nature, is temporary, and the necessary effect of a termination of the suspension is a reinstatement of the suspended officer, where the law has not otherwise provided.

But an officer who has been suspended, and is afterward thus reinstated, may be again suspended by the President during the recess of the Senate.

DEPARTMENT OF JUSTICE,

August 8, 1870.

SIR: Your letter of the 2d instant, in relation to the postmaster at Nashville, Tennessee, has been received.

It appears that Bowling Embry held that office under a regular appointment by and with the advice and consent of the Senate for a term which has not yet expired; that on the 5th of May, 1869, the President suspended him under the authority of the tenure of office act of April 5, 1869; that Enos Hopkins was designated in his place, and afterward, to wit, on the 6th of December, 1869, was nominated to the Senate for the office, and was rejected by the Senate on the 5th day of July, 1870, too late for the President to make another nomination at that session.

Upon these facts you inquire, "1. Whether Mr. Embry is entitled to be reinstated in the office under his unexpired commission, dated April 20, 1867, for four years from the date thereof?"

I reply in the affirmative. The tenure of office acts give to every civil officer, appointed by and with the advice and consent of the Senate, a right to his office during the whole term for which he has been appointed, unless sooner removed by and with the advice and consent of the Senate, or by the appointment with the like advice and consent of a successor in

Tenure of Office Act.

his place, except as otherwise provided in those acts. Mr. Embry has not been removed by and with the advice and consent of the Senate. He has not been removed by the appointment, with the like advice and consent, of a successor in his place. Thus he falls within the very terms of the act, and is entitled to the office, unless he comes within the exception in the act. That exception authorizes his suspension by the President until the end of the next session of the Senate, and authorizes nothing more but the designation of a temporary substitute to serve during the suspension.

A suspension in its very nature is temporary, and the necessary effect of a termination of the suspension is a reinstatement of the suspended officer where the law has not otherwise provided. The office is not in abeyance under the third section of the tenure of office act, for it is not vacant by reason of death, or resignation, or expiration of term, and has not been filled after such a vacancy under a temporary commission. Being then of opinion that the office exists as one to be filled, and that the temporary incapacity of Mr. Embry to act in it, created by the suspension, has ceased, I think that he is lawfully in the office and may perform its duties until a vacancy or a second suspension.

2. You also inquire, "Whether the President is authorized, during the recess of the Senate, to again suspend the said Embry from the said office, and to designate a second person to perform the duties thereof?"

I think he has full authority to do so. No new immunities are, by the tenure of office act, conferred upon an officer who has been suspended and then restored by the failure of the Senate to convert his suspension into a removal. Congress has manifested no intent in any laws now in force to make such officers wholly independent, during the recess of the Senate, of the President, who is charged with the duty of seeing that the laws be faithfully executed, a duty which cannot be well performed without a power to displace, at least temporarily, officers to whom he has satisfactory grounds of objection.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. J. A. J. CRESWELL,
Postmaster-General.

Army Officers on the Active List.

ARMY OFFICERS ON THE ACTIVE LIST.

The provisions of section 18 of the act of June 30, 1871, prohibiting Army officers on the active list from holding any civil office, extend to State offices as well as to offices under the United States, and to those offices for which no compensation is provided as well as to those for which compensation is allowed.

DEPARTMENT OF JUSTICE,
August 10, 1870.

SIR: Your communication of the 8th instant calls for my opinion upon the question submitted to you by Major-General George G. Meade, of the United States Army, whether the exercise by him of the functions of a park commissioner of the city of Philadelphia will, under section 18 of the act of Congress of July 15, 1870, entitled "An act making appropriations for the support of the Army for the year ending June 30, 1871, and for other purposes," disqualify him from holding a commission as an officer on the active list of the Army.

The section referred to is in these words: "That it shall not be lawful for any officer of the Army of the United States on the active list to hold any civil office, whether by election or appointment, and any such officer accepting or exercising the functions of a civil office shall at once cease to be an officer of the Army, and his commission shall be vacated thereby."

The office of park commissioner has been established by an act of the legislature of Pennsylvania, which designates the mode of appointment, the term of office, and the functions to be performed by the commissioners, and provides that they shall receive no compensation for their services. Their functions are of a civil nature, and are such as must be embraced within any authorized definition of the term *office*. It is none the less an office on account of the provision that they shall receive no compensation. The distinction between offices of honor and offices of profit is a familiar one, and is recognized in the Constitution of the United States.

The only doubt that could possibly be suggested in this

Utah Territory.

case arises from the fact that the office in question is under a State, and it may, perhaps, be thought that, when acts of Congress refer to offices, they signify offices under the United States only. But in view of the close relation between the several States and the National Government, and of the manifest purpose of Congress in enacting the prohibition in section 18, which was to disencumber Army officers of every species of official duty not belonging to their military profession, I am satisfied that this office is fairly within the scope of the prohibition, and am, therefore, of opinion that General Meade cannot exercise its functions without vacating his commission as an officer of the Army.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. WILLIAM W. BELKNAP,
Secretary of War.

UTAH TERRITORY.

Under the organic act of the Territory of Utah, the territorial legislature has power to prescribe the mode of electing or appointing judges of probate in that Territory.

DEPARTMENT OF JUSTICE,
August 16, 1870.

SIR: I have received yours of the 9th instant, requesting my opinion upon the questions presented to the State Department by the governor of Utah in his communication of July 22, 1870.

The question is this: Whether, under the act organizing the Territory of Utah, the right to prescribe the mode of electing or appointing judges of probate is vested in the legislative assembly of that Territory?

The act provides that "all township, district, and county officers, not herein otherwise provided for, shall be appointed or elected, as the case may be, in such manner as shall be provided by the governor and legislative assembly of the Territory of Utah."

I understand a judge of probate in Utah to be a county officer, and therefore he falls within the terms of this pro-

Customs Officers.

vision, (there being no other provision touching such officers in the organic act,) and the manner of appointment or election is in the hands of the governor and legislative assembly. And I see no inconsistency with the organic law in the statutory provision, that the probate judges shall be elected by the joint vote of the legislative assembly. Whether a choice by that mode is properly an appointment or an election is a mere verbal question, and whether it be denominated by one or the other of those terms, the legislature has power to prescribe it.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. J. C. B. DAVIS,

Acting Secretary of State.

CUSTOMS OFFICERS.

The act of July 27, 1866, (14 Stat., 302,) repealed the 5th section of the act of March 3, 1851, (9 Stat., 598,) so far as that section relates to the appraisers and assistant appraisers for the port of New York; but no further.

Section 8 of the act of July 12, 1870, does not repeal the aforesaid act of 1851, as regards the compensation of naval officers and surveyors of the ports therein mentioned. That section does not increase the fees of those officers ; it merely permits them to retain the fees as their own up to a greater maximum than before.

DEPARTMENT OF JUSTICE,

August 17, 1870.

SIR: Your communication of the 15th instant, and the inclosed letter from the Commissioner of Customs, present for consideration the following matters:

The act of March 3, 1851, entitled "An act making appropriations for the civil and diplomatic expenses of the Government for the year ending the 30th of June, 1852, and for other purposes," (9 Stat., 598,) provided in section 5 that there should be paid thereafter "to each of the assistant and deputy collectors and principal appraisers at the ports of Boston, New York, Philadelphia, Baltimore, and New Orleans two thousand five hundred dollars per annum; and the assistant appraisers at the ports of Boston, New York, Philadel-

Customs Officers.

phia, and New Orleans shall each hereafter receive for his services two thousand dollars per annum: *Provided*, The entire expense of collecting the revenue shall not be increased, the Secretary of the Treasury being hereby directed and required to cause such a *pro rata* reduction to be made in the number of persons, and in the fees now allowed by law to officers employed in the collection of the revenue, as in his discretion may be just and expedient, to an extent which will provide the additional compensation hereby secured to the said appraisers and assistant appraisers."

The effect of this section was to add to the compensation of certain officers; and the increase was to be made up by a sufficient reduction of the number and pay of other persons employed in the collection of the revenue.

The act of July 27, 1866, entitled "An act to amend the acts relating to officers employed in the examination of imported merchandise in the district of New York, and for other purposes," (14 Stat., 302,) which took effect September 1, 1866, abolished the offices of appraisers and assistant appraisers as theretofore authorized by law for the port of New York, and provided for the appointment of one appraiser and not exceeding ten assistant appraisers, and for a compensation to the appraiser of \$4,000 and to the assistant appraisers of \$3,000 per annum, "to be paid out of the appropriations for defraying the expenses of collecting the revenue."

You request my opinion upon the question whether section 5 of the act of March 3, 1851, is repealed by the act of July 27, 1866.

I am of opinion that said section is repealed, so far as it relates to the appraisers and assistant appraisers for the port of New York, but no further.

Those offices, as they existed at the date of the act of 1866, ceased on the 1st day of September in that year, and all the provisions for compensating the officers ceased also. New offices, with the same names and substantially the same functions, but created by the very terms of the act, in lieu of the former ones, came into existence on that day, with a prescribed rule of compensation different from that by which the former officers had been paid. The act of 1866, being inconsistent with no part of the act of 1851, except the

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provisions of the latter act relating to the appraisers and assistant appraisers at New York, repeals no other part of it.

You also inquire whether section 8 of the act of July 12, 1870, entitled "An act making appropriations for the legislative, executive, and judicial expenses of the Government for the year ending the 30th of June, 1871," repeals the act of 1851, above referred to, so far as relates to the compensation of naval officers and surveyors of the ports above mentioned.

I think it does not. That section gives to naval officers and surveyors maximum compensations of \$5,000 and \$4,500, respectively, out of any and all fees and emoluments by them received. This means their lawful fees only. The act of 1851 reduced their fees, in common with those of other revenue officers, enough to provide the additional compensation given by that act to the appraisers and assistant appraisers at the enumerated ports. The act of July 12, 1870, does not increase the fees. It merely permits the favored officers to retain the fees as their own up to a greater maximum than before.

Very respectfully, &c.,

A. T. AKERMAN.

Hon. Wm. A. RICHARDSON,
Acting Secretary of the Treasury.

CONTRACTS FOR QUARtermaster's STORES.

No person can make a valid contract in behalf of the United States unless expressly or impliedly authorized by statute so to do; but, if so authorized, the right to make such contract is not necessarily limited to contracts with persons who are not enemies of the United States.

Whether the right to make the contract is a right to make it with an enemy, depends upon the true construction of the statutes authorizing the making of the contract, and not upon any general principles of public law.

An express contract made in behalf of the United States, during the rebellion, with a citizen and resident of an insurrectionary State, for quartermaster's supplies, if the officer making it acted under competent authority, is valid.

The settlement of a claim arising under such a contract is not barred by the acts of July 4, 1864, and February 21, 1867.

Review of the statutes relative to the making of contracts in behalf of

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the United States for quartermaster's stores down to and including the act of July 4, 1864, (13 Stat., 394;) from which it appears that, under the law as it stood after the passage of that act, Congress has not authorized purchases or contracts for such stores to be made except in the following manner:

1. By or under the direction of the chief officer of the Department of War, (act of July 16, 1798.)

2. By the officers of the Quartermaster's Department, under the direction of the Secretary of War, (acts of March 28, 1812, and August 23, 1842,) or under the direction of the Quartermaster-General, or, in cases of emergency, by the chief quartermaster of an army or detachment under the order of the commanding officer, (act of July 4, 1864.)

3. All contracts to be made after previous advertisement for proposals respecting the same, except in cases of emergency, (act of July 4, 1864.) Regimental quartermasters are not officers of the Quartermaster's Department; they are properly staff officers of their respective regiments, who, besides other duties, are charged with the custody and issuing of supplies.

DEPARTMENT OF JUSTICE,*September 2, 1870.*

SIR: I have received your letter of the 16th of April last, transmitting certain papers relating to the claims of James B. McCubbin and Mary E. Lacey to be paid for forage alleged to have been furnished by them to the Army of the United States during the late rebellion. The supplies were received by the Army in the State of Arkansas. Both claimants were, during the rebellion, citizens of Arkansas, resident there, and claim to have been loyal persons, and to have delivered the supplies under express contracts.

You call my attention to the act of Congress approved February 21, 1867, (14 Stat., 397,) and ask whether this act prohibits the settlement of these claims; and you say that the opinion of Attorney-General Evarts in the Rollings case (12 Opin., 439) has not been considered by the Department of War as covering the case of a claim presented by one who was, when his claim originated, a resident and citizen of a State in rebellion against the United States. Mr. Evarts, in construing the act of July 4, 1865, (13 Stat., 381,) and the act of February 21, 1867, already mentioned, was of opinion that the act of 1867, so far as it related to quartermaster's stores, embraced only the class of claims covered by the act of 1864, and that the act of 1864 was not intended to apply

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to claims arising under an express contract entered into by the proper officer of the Quartermaster's Department for the purchase of such materials as such officer was authorized by law to purchase. The contract in the Rollings case was made by an assistant quartermaster. If this opinion be correct—and I think it is—and if the claims of Mr. McCubbin and Mrs. Lacey arise under valid express contracts, then the acts of 1864 and 1867 have nothing to do with them; and the only question is, whether other acts of Congress or any principles of law invalidate contracts for Army supplies, otherwise valid, because the person with whom they were made by the authorized officer of the United States was, at the time the contracts were made, a rebel and an enemy, or, if personally loyal, was resident within the territorial limits of the rebellion.

That the late civil war had the effect to render unlawful all trading between the citizens or persons domiciled in that part of the United States which remained loyal, and the citizens or persons domiciled within the territorial limits of the rebellion, and suspended all remedies on contracts previously made between such citizens or persons during the existence of the rebellion, is certain; but a contract between the United States and a person domiciled within rebel territory is not a contract between enemies in the ordinary sense of those words. No person can make a valid contract in behalf of the United States, unless expressly or impliedly authorized by statute so to do; but, if so authorized, the right to make such a contract is not necessarily limited to contracts with persons who are not enemies of the United States. Whether the right to make the contract is a right to make it with an enemy, depends upon the true construction of the statutes authorizing the making the contract, and not upon any general principles of public law. Whether an army in the enemy's country shall purchase its supplies, or take them from the citizens or subjects of the enemy, is in general a question of policy. If it be judged best to purchase by the persons charged with the conduct of the war, the purchases are not invalid as being contracts with enemies. It is well known that in the war between the United States and Mexico, the Army of the United States procured its supplies

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in Mexico generally by purchase, although undoubtedly it had the right to appropriate what property it needed, or could have levied taxes or forced loans upon the people of Mexico for its support. (Halleck's International Law, pp. 459, 460.)

The act of July 4, 1864, in its 1st section, restricted the jurisdiction of the Court of Claims. By the 2d and 3d sections it provided for the settlement of claims of loyal citizens in States not in rebellion for quartermaster's and subsistence stores actually furnished to the Army of the United States and received for by the proper officers receiving the same, or which had been taken by such officers without giving such receipt.

The act of February 21, 1867, prohibited the settlement of any claim for supplies and stores taken or furnished for the use of or used by the armies of the United States, &c., where such claim originated during the war for the suppression of the southern rebellion in a State or part of a State declared in insurrection by the proclamation of the President of July 1, 1862; or in a State which, by an ordinance of secession, attempted to withdraw from the United States.

The reason why these acts were passed have been fully stated in the opinion in the Rollings case, and other opinions of Attorneys-General. Army supplies lawfully purchased for the United States were paid for out of the annual appropriations for the Army, and the account adjusted in the usual way; but supplies were often furnished for the Army, or taken by the Army, and receipts given or not given, and this was done either under the form of a contract which had not been so executed as to bind the United States, or without even the form of a contract; and Congress determined to pay what these supplies were reasonably worth when they were furnished in a loyal State by a loyal person resident in a loyal State, otherwise it prohibited the settlement and payment of the claim. Congress did not ratify such invalid contracts, when any had been made, for the purposes of settlement and payment, and did not distinguish between supplies furnished under invalid contracts and supplies furnished or taken without even the form of a contract, and did not regard the receipt given by the proper officer for the supplies furnished as constituting a con-

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tract. Claims for supplies presented under valid express contracts were settled under other statutes and in the usual way; claims for supplies furnished the Army under such circumstances as between individuals would imply a contract to pay what they were reasonably worth, were to be settled under the acts of July 4, 1864, and February 21, 1867, provided the claimant was a loyal citizen resident in a State not in rebellion, and the claim originated, that is, the supplies were furnished, in a State not declared in insurrection, and in a State that did not pass an ordinance of secession. Whether the claims of McCubbin and Mrs. Lacey arose under valid express contracts is a question of fact and law. It is not for me to determine the facts; but the following references to the statutes, which confer authority on military officers to make contracts in behalf of the United States for Army supplies, may be useful.

The 5th section of the act of May 8, 1792, (1 Stat., 280,) provided "that all purchases and contracts for supplying the Army with provisions, clothing, supplies in the Quartermaster's Department, military stores, Indian goods, and all other supplies or articles for the use of the Department of War, be made by or under the direction of the Treasury Department."

Before the passage of this act it would seem that the Secretary for the Department of War had a general supervision of such purchases and contracts under the direction of the President, as properly falling within the scope of the duties devolved upon him by the 1st section of the act of August 7, 1789, creating that Department. (1 Stat., 49.)

The act of February 23, 1795, (1 Stat., 419,) provided for the appointment in the Department of the Treasury of a "purveyor of public supplies," and made it his duty, "under the direction and supervision of the Secretary of the Treasury, to conduct the procuring and providing of all arms, military and naval stores, provisions, clothing, Indian goods, and generally all articles or supplies requisite for the service of the United States;" and before entering upon the duties of his office he was required to give a bond with sufficient sureties, &c.

By the 3d section of the act of July 16, 1798, (1 Stat., 610,)

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it was provided "that all purchases and contracts for supplies or services for the military and naval service of the United States shall be made by or under the direction of the chief officers of the Department of War and the Navy respectively," the Navy Department having been established on the 30th day of April of the same year; and by the 4th section it was made the duty of the purveyor of public supplies "to execute all such orders as he may from time to time receive from the Secretary of War or Secretary of the Navy relative to the procuring and the providing of all kinds of stores and supplies."

By the 6th section it was provided "that all contracts to be made by virtue of this act or of any law of the United States, and requiring the advance of money, or to be in any manner connected with the settlement of public accounts, shall be deposited in the office of the Comptroller of the Treasury of the United States within ninety days after their dates respectively."

The 3d section of the act of March 16, 1802, fixing the military peace establishment of the United States, (2 Stat., 133,) authorized the appointment of "military agents," whose duty is prescribed by the 17th section of the same act, which was "to purchase, receive, and forward to their proper destination, all military stores and other articles for the troops in their respective departments, and all goods and annuities for the Indians, which they may be directed to purchase or which shall be ordered into their care by the Department of War." But before entering upon their duties these agents were required to give bonds with sufficient sureties, &c.

The 5th section of the act of April 21, 1808, (2 Stat., 484,) required the Secretary of the Treasury, the Secretary of War, the Secretary of the Navy, and the Postmaster-General annually to lay before Congress "a statement of all the contracts which have been made in their respective departments during the year preceding such report."

The 3d section of the act of March 3, 1809, (2 Stat., 536,) declares "that exclusively of the purveyor of public supplies, paymasters of the Army, pursers of the Navy, military agents and other officers already authorized by law, no other permanent agents shall be appointed either for the purpose of mak-

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ing contracts, or for the purchase of supplies, or for the disbursement in any other manner of moneys for the use of the military establishment or of the Navy of the United States, but such as shall be appointed by the President of the United States with the advice and consent of the Senate."

The 4th section required every such agent as might be appointed by virtue of the next preceding section to give bond with one or more sufficient sureties, &c.; and the 5th section provided that "all purchases and contracts for supplies or services which are or may according to law be made by or under the direction of either the Secretary of the Treasury, the Secretary of War, or the Secretary of the Navy, shall be made either by open purchase or by previously advertising for proposals respecting the same," and an annual statement of all such contracts and purchases as was required to be laid before Congress at the beginning of each year by the Secretaries of the proper Departments.

Important modifications of the laws relating to the purchase of and contract for Army supplies were made by the act of March 28, 1812, (2 Stat., 696.)

By the 1st section provision was made for the appointment of a Quartermaster-General, deputy quartermasters, and assistant deputy quartermasters; and by the 3d section it was provided that, in addition to their duties in the field, it should be the duty of these officers, when thereto directed by the Secretary of War, "to purchase military stores, camp equipage, and other articles requisite for the troops, and generally to procure and provide means of transport for the Army, its stores, artillery, and camp equipage."

The 4th section provided for the appointment of a "Commissary-General of Purchases" and "deputy commissaries."

The 5th section made it the duty of the Commissary-General of Purchases, under the direction and supervision of the Secretary of War, "to conduct the procuring and providing of all arms, military stores, clothing, and generally all articles of supply requisite for the military service of the United States;" and the same section made it the duty of the deputy commissary, when directed thereto either by the Secretary of War, the Commissary-General of Purchases, or, in cases of necessity, by the commanding general, quartermaster-gen-

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eral, or deputy quartermasters, to purchase all such of the aforesaid articles as may be requisite for the military service of the United States. The Commissary-General of Purchases, and each of the deputy commissaries, were required by the 8th section to give bonds with sufficient sureties, &c.; and by the 9th and 18th sections the offices of purveyor of public supplies and military agent, established by the acts of February 23, 1795, and March 16, 1802, were abolished.

By the 4th section of the amendatory act of May 22, 1812, (2 Stat., 743,) the Quartermaster-General, the deputy quartermasters, and the assistant deputy quartermasters were each required to give bond with sufficient security, &c.

The 2d section of the act of March 3, 1813, (2 Stat., 816,) provided for a "Superintendent-General of Military Supplies," to reside at the seat of Government, and to perform, besides certain prescribed duties, "all such other duties respecting the general superintendence of the purchase, transportation, safe-keeping, and accountability of military supplies and stores as aforesaid as may be prescribed by the Secretary for the War Department."

The office of Superintendent-General of Military Supplies was abolished by the 1st section of the act of March 3, 1817, (3 Stat., 366,) but by the 5th section of the act of March 3, 1813, the Secretary of War was authorized and directed "to define and prescribe the species as well as the amount of supplies to be respectively purchased by the Commissary-General's and Quartermaster-General's Department, and the respective duties and powers of said Department respecting such purchases."

By the 1st section of the act of April 24, 1816, (3 Stat., 297,) it was provided that the general staff of the Army should in future consist, among other officers, of one Quartermaster-General, with one deputy quartermaster-general to a division, and an assistant of each to every brigade, and the 5th section provided that the purchasing department should consist of one Commissary-General of Purchases, as theretofore authorized, one deputy commissary to each division, six assistant commissaries of issues, and as many military store-keepers as the service required.

By the 6th section the officers both of the Commissary and

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Quartermaster's Departments were required to give bonds, with sufficient sureties, &c.

The 3d section of the act of April 14, 1818, (3 Stat., 426,) repealed so much of the act of April 24, 1816, as related to the quartermaster-general of division, and provided that the Quartermaster's Department should consist, in addition to two Deputy Quartermasters-General and four Assistant Deputy Quartermasters-General, as previously authorized, of one Quartermaster-General, and as many Assistant Deputy Quartermasters-General as the President should deem proper, not exceeding in the whole number twelve.

The 6th section authorized the appointment of a Commissary-General of Subsistence and assistant, who were required to "perform such duties in purchasing and issuing of rations to the Army of the United States as the President might direct."

The next following sections contained directions relative to the manner of procuring subsistence stores, &c., which description of Army supplies thenceforth forms the subject of special legislative provisions. (See the act of January 23, 1823, 3 Stat., 721; the act of March 2, 1829, 4 Stat., 60; the act of March 3, 1835, 4 Stat., 780.)

By the 6th section of the act of May 1, 1820, (3 Stat., 568,) it was enacted "that no contract shall hereafter be made by the Secretary of State, or of the Treasury, or of the Department of War, or of the Navy, except under a law authorizing the same, or under an appropriation adequate to its fulfillment, and excepting, also, contracts for the subsistence and clothing of the Army or Navy, and contracts by the Quartermaster's Department, which may be made by the Secretaries of those Departments."

The organization of the Quartermaster's Department underwent some changes under the act of March 2, 1821, (3 Stat., 615.) By the 7th section that Department was made to consist of one Quartermaster-General, two quartermasters with the rank of major of cavalry, and ten assistant quartermasters. Afterward, by the 4th section of the act of May 18, 1826, (4 Stat., 174,) two quartermasters of the same rank, and ten assistant quartermasters, were added. Further additions were made by the 9th section of the act of July 5, 1838,

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(5 Stat., 257,) of two Assistant Quartermasters-General with the rank of colonel, two Deputy Quartermasters-General with the rank of lieutenant-colonel, eight assistant quartermasters with the rank of captain, and it was provided that the assistant quartermasters then in service should have the rank of captain.

By the 9th section of the act of March 2, 1821, before cited, the purchasing department was made to consist of one Commissary-General of Purchases and two military storekeepers. By the 3d section of the act of August 23, 1842, (5 Stat., 513,) the office of Commissary-General of Purchases, sometimes called commissary of purchases, was abolished, and the duties thereof were thereafter required to be performed by the officers of the Quartermaster's Department, with such of the officers and clerks then attached to the purchasing department as should be authorized by the Secretary of War, and under such regulations as should be prescribed by the said Secretary under the sanction of the President of the United States.

At the time of the passage of this act, the purchasing department was, by the regulations, charged with the "purchase of all clothing, tents, tent-poles, camp-kettles, mess-pans, bed-sacks, and all other articles required for the Army," except only such as were ordered to be purchased by the Quartermaster's, Subsistence, Ordnance, Engineer, and Medical Departments. (See Army Regulations of 1841, p. 366, par. 1259; and p. 179, par. 924 *et seq.*) The same division of duties between the purchasing and Quartermaster's Departments is found in the Regulations of 1835, pp. 138, 208, and also in the Regulations of 1821, pp. 180, 237; and was undoubtedly made in pursuance of the 5th section of the act of March 3, 1813, hereinbefore cited, which directed the Secretary of War to define and prescribe the respective duties and powers of those Departments relating to the purchase of supplies.

It will be seen that at the time of the passage of the act of August 23, 1842, the "officers of the Quartermaster's Department" comprised the following: Quartermaster-General, Assistant Quartermaster-General, Deputy Assistant Quartermaster-General, quartermasters, and assistant quartermasters, all of whom were required to give bonds with sufficient security for the faithful performance of their duties.

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After the office of commissary of purchases was abolished, the remaining officers of the purchasing department, viz, the two military store-keepers authorized by the act of March 2, 1821, became permanently attached to the Quartermaster's Department.

The 2d section of the act of March 3, 1857, (11 Stat., 203,) created in the Quartermaster's Department five additional military store-keepers, who were to give the bonds and security required by the existing laws; and the 8th section of the act of July 5, 1862, (12 Stat., 509,) authorized as many more to be appointed in the same Department as the exigencies of the service might require, provided the whole number in the Department should not exceed twelve; so that to the other officers of the Quartermaster's Department above mentioned may be added, since the passage of the act of August 23, 1842, military store-keepers, who also are to give bonds with sufficient security for the faithful performance of their duties.

No important changes appear to have been subsequently made in the organization of the Quartermaster's Department, (see section 5 of the act of June 8, 1846, 9 Stat., 17; section 10 of the act of February 11, 1847, 9 Stat., 126; section 3 of the act of August 3, 1861, 12 Stat., 287,) until the passage of the act of July 4, 1864, (13 Stat., 394,) which, however, created no new or different grades among the officers of that Department, but established a number of divisions therein and assigned to each certain duties.

By section 4 of the act of May 4, 1858, (11 Stat., 269,) it was provided that "whenever thereafter contracts should be made by the Secretary of War or of the Navy, by virtue of the 6th section of the act of May 1, 1820, he should, if Congress be in session at the time, promptly report to both Houses thereof the reasons for making such contract, stating fully all the facts and circumstances which, in his judgment, rendered such contract necessary; that if Congress be not in session at the time of making such contract he should at the commencement of their next session make such report to both Houses, and that no such contracts should be made thereafter except in cases of pressing exigency."

The 3d section of the act of June 23, 1860, (12 Stat., 103,) provided "that all purchases and contracts for supplies or

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services in any of the Departments of the Government, except for personal services, when the public exigencies do not require the immediate delivery of the article or articles or performance of the service, shall be made by advertising a sufficient time previously for proposals respecting the same. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract at the places and in the manner in which such articles are usually bought and sold, or such services engaged between individuals. No contract or purchase shall hereafter be made unless the same be authorized by law or be under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the current year. No arms nor military supplies whatever which are of a patented invention shall be purchased, nor the right of using or applying any patented invention, unless the same shall be authorized by law, and the appropriation therefor explicitly set forth that it is for such patented invention."

This section was partially repealed by the 5th section of the act of February 21, 1861, (12 Stat., 150,) and wholly repealed by the 10th section of the act of March, 2, 1861, (12 Stat., 220,) which, however, re-enacted the provisions of the section so repealed, word for word, except the clause prohibiting the purchasing of patented fire-arms unless the same should be authorized by law.

Further provisions in regard to contracts were made by the act of June 2, 1862, (12 Stat., 411.) See also the act of July 17, 1862, (12 Stat., 600;) resolution No. 53 of July 12, 1862, (12 Stat., 624;) and section 13 of the act of July 17, 1862, (12 Stat., 596.)

The act of July 4, 1864, (13 Stat., 394,) already referred to, was in force at the time it is alleged that the contracts with the claimants were made. The 1st section of this act established in the Quartermaster-General's office, to exist during the rebellion and one year thereafter, nine divisions, each of which was to be placed in the charge of a competent officer of the Quartermaster's Department, who was directed to transact the business of his division under the rules prescribed by

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the Quartermaster-General, with the approval of the Secretary of War, one of these divisions, the fifth, being charged with the "purchase, procurement, issue, and disposition of forage and straw for the Army." The 2d section required the heads of the several divisions, under the direction of the Quartermaster-General, from time to time to "advertise for proposals for the supplies necessary for the movements and operations of the several armies, posts, detachments, garrisons, hospitals, and for other military purposes, in newspapers having general circulation in those parts of the country where such supplies can be most advantageously furnished, having regard also to the places where such supplies are to be delivered and used." And it is also provided that all such supplies so purchased or contracted for should be subject to careful inspection, and that all payments therefor should be made under the direction of the officers in charge of the several divisions "upon receipts or certificates from the officers inspecting and receiving the supplies, prepared in such form and attested in such manner as may be prescribed by the Quartermaster-General." The 4th section enacted as follows: "That when an emergency shall exist requiring the immediate procurement of supplies for the necessary movements and operations of an army or detachment, and when such supplies cannot be procured from any established depot of the Quartermaster's Department, or from the head of the division charged with the duty of furnishing such supplies within the required time, then it shall be lawful for the commanding officer of such army or detachment to order the chief quartermaster of such army or detachment to procure such supplies during the continuance of such emergency, but no longer, in the most expeditious manner, and without advertisement; and it shall be the duty of such quartermaster to obey such order; and his accounts of the disbursement of moneys for such supplies shall be accompanied by the order of the commanding officer as aforesaid, or a certified copy of the same, and also by a statement of the particular facts and circumstances, with their dates, constituting such emergency."

From these statutes it appears that at the time it is alleged these contracts with McCubbin and Mrs. Lacey were made

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Congress had not authorized purchases or contracts for quartermaster's stores to be made, except in the following manner:

1. By or under the direction of the chief officer of the Department of War, (act of July 16, 1798.)
2. By the officers of the Quartermaster's Department under the direction of the Secretary of War, (act of March 28, 1812, and act of August 23, 1842,) or under the direction of the Quartermaster General, or, in cases of emergency, by the chief quartermaster of an army or detachment under the order of the commanding officer, (act of July 4, 1864.)
3. All contracts to be made after previous advertisements for proposals respecting the same, except in cases of emergency, (act of July 4, 1864.)

The officers of the Quartermaster's Department have already been named, and among them *regimental quartermasters* are not included. They are not officers of that Department. They are properly staff officers of their respective regiments, who, beside other duties, are charged with the custody and issuing of supplies. They are usually appointed from the subaltern officers of the regiment. They had at all times constituted a part of the regimental staff in the military establishment, and are expressly mentioned in the 3d section of the act of March 3, 1813, before cited, as officers distinct from those belonging to the Quartermaster's Department. Furthermore, they were not required to give bonds, and it will be noticed that Congress has uniformly required all officers, except heads of Departments, upon whom it has conferred general authority to make purchases or contracts in behalf of the Government for military supplies, to give bonds.

Your letter does not distinctly ask the opinion of the Attorney-General upon the question, what constitutes a valid express contract for forage? You ask whether the settlement of the claims of Mr. McCubbin and Mrs. Lacey is prohibited by the act of February 21, 1867, and you say they both claim to have been loyal persons and to have delivered the supplies under express contracts, and that the supplies were received in the State of Arkansas, in which State both the claimants were residents during the rebellion, and were citizens of it.

I have no right to determine questions of fact; and I am

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not certain that all the evidence upon the questions of fact has been transmitted with the papers so that I can assume as facts what may ultimately be found to be the facts by the proper officers. The claimants contend that the contracts, if made, were authorized by the 4th section of the act of July 4, 1864, and that the supplies were procured under the circumstances and in the manner required by that section. Whether the facts are so or not I express no opinion, neither do I express any opinion upon the construction that should be given to this 4th section of the act of July 4, 1864, nor whether the chief quartermaster therein named must be an officer of the Quartermaster's Department, or may be any person acting as chief quartermaster of the army or detachment under the orders of the commanding officer, as these questions are not distinctly asked me, and the case in its present condition does not require that I should consider them.

Your inquiry is fully answered by the opinion which I have already herein expressed, namely, that if the claims of Mr. McCubbin and Mrs. Lacey arise under valid express contracts, they are not barred by the act of July 4, 1864, nor by that of February 21, 1867.

Very respectfully,

THOMAS H. TALBOT,
Acting Attorney-General.

Hon. WM. W. BELKNAP,
Secretary of War.

NAVAL PENSIONS.

The widow of a naval officer who died at a navy-yard or station of a disease contracted while on duty there, is not entitled to a pension under the provision of section 2 of the act of July 27, 1868.

DEPARTMENT OF JUSTICE,
September 6, 1870.

SIR: Your letter of the 30th ultimo, which I have considered, informs me as follows:

"John Rudenstein, a surgeon in the United States Navy, died at the navy-yard, in Pensacola, on the 9th day of De-

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cember last, of gastritis, contracted shortly before that time while he was attached to the navy-yard and hospital at that place. His widow, Frances Julia Rudenstein, applied for a pension. It was rejected by the Pension-Office upon the ground that said John at the time that he contracted the disease, and at his death, was not borne on the books of any ship or other vessel of the United States, at sea or in harbor, actually in commission, and was not on his way by direction of competent authority to the United States, or to some other vessel or station."

You request to be informed whether, in my opinion, the widow of the deceased, Mrs. Rudenstein, in view of the facts hereinbefore stated, is entitled to a pension.

I am compelled to answer in the negative. The statute of July 27, 1868, sec. 2, (15 Stat., 235,) does not allow a pension in a case of death, by reason of disease contracted in the service of the United States subsequently to the passage of that act, unless the person contracted disease in the line of duty, and "if in the naval service, was at the time borne on the books of some ship, or other vessel of the United States, at sea or in harbor, actually in commission, or was *on his way*, by *direction of competent authority*, to the United States, or to *some other vessel or naval station*."

No reason occurs to me why death caused by disease contracted *while on the way* to some naval station should be a circumstance entitling to a pension, while death caused by disease contracted on duty *at such station* should not thus entitle; but such distinction is found in the omission of the statute to provide pensions for persons in the service *at such station*; and the refusal of the Commissioner of Pensions to allow a pension in this case seems to me justified by the limitations of the statute in question.

I have the honor to be, &c.,

THOMAS H. TALBOT,

Acting Attorney-General.

Hon. J. D. Cox,

Secretary of the Interior.

Marine Hospital Service.

MARINE HOSPITAL SERVICE.

The new rate of taxation upon vessels, for the marine hospital, provided by the 1st and 2d sections of the act of June 29, 1870, was intended to be laid uniformly from and after August 1, 1870. Accordingly, such rate first accrued on any vessel on the 2d of August, 1870; up to which date the former tax of 10 cents per month is still collectible.

Canal-boats are not liable to the tax imposed by that act.

DEPARTMENT OF JUSTICE,

October 7, 1870.

SIR: You have requested the opinion of the Attorney-General as to the proper construction of the act approved June 29, 1870, to re-organize the marine hospital service, and to provide for the relief of sick and disabled seamen, in points which, without formal statement, appear in my answer.

Of this act, the sections which impose a tax are the 1st and 2d, and of each of these the opening words are "from and after the 1st day of August, 1870." These words are made thus prominent in order, in my opinion, to fix the time when this statute was to take effect, as imposing a new rate of tax, instead of the rate existing when this statute was approved.

It seems unreasonable to suppose that the law-making power should have intended the new rate of taxation should attach at one time to one vessel, and at another time to another. Here, certainly, uniform legislation might be looked for. But it would be very far from uniformity to make a new rate of taxation, established June 29, 1870, with reference to August 1 following, take effect retroactively in some instances from both dates, on the different days before the later, whenever vessels had last entered ports of the United States, or taken out enrollment or license as far back, it might be in some instances, as five years. In my opinion the intention of Congress was that the new rate of tax should be laid uniformly from and after a day certain, viz., August 1, 1870. Accordingly, the first day on which the new rate of tax accrued on any vessel was the 2d day of August last.

Up to that date the tax of ten cents per month is still collectible.

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In considering the question who are taxable under the provisions of this act, the 7th section may be passed by. It is in this respect nugatory. The term which it proposes to define, "vessel," is not to be found in any preceding section of the law; and, therefore, its definition is of no force in the construction of those preceding sections. The terms used in the sections imposing this tax (sections 1 and 2) are "vessel of the United States arriving from a foreign port," "registered vessels employed in the coasting trade," and "vessel whose enrollment or license for carrying on the coasting trade has expired;" which terms the 5th section gathers into briefer form, as "registered, enrolled, and licensed vessels of the United States."

No other vessels than these are subject to the tax by this act. It is true that this 7th section proposes to make a raft constitute a vessel, but it does not propose to enact that a raft shall be deemed a vessel of the United States; and until this latter is done, rafts are not taxable under this act.

In this consideration, the earlier legislation and administration are important. The act of July 16, 1798, (1 Stat., 605,) was of like extent with this. But, as I am informed, the Treasury Department never, with any uniformity of practice, deemed canal-boats as subject to this tax. Its uniform practice, so far as its practice was uniform in this matter, was to treat them as not subject. At least one judicial decision (cited in Brightly's Digest, p. 305,) declared them exempt. These were the circumstances under which Congress secured their freedom from this tax by passing the act of July 20, 1846, (9 Stat., 38,) and in the light of such circumstances I read this statute as a declaratory act. As such I do not deem it repealed by the act of June 29, 1870, the main purpose of which was merely to change the rate of taxation. The two acts can stand together, and it is a well-known rule for the construction of statutes that repeals by implication are not to be favored. It is also equally well established that, where a certain enactment has received an authoritative construction, known to the legislature, a subsequent re-enactment of the same provision adopts such construction. In my opinion, this rule is not vacated, but corroborated, by the circumstance that the legislature itself (in this case following the

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other departments of the Government) has legalized such construction.

Furthermore, the act of 1846, upon this subject, in my opinion, constitutes a unit whose parts must be considered together. One of its provisions positively prohibits persons employed to navigate canal-boats from receiving any benefit or advantage from the marine hospital fund, and with this provision there is nothing absolutely inconsistent in the provisions of the act of June 29, 1870. Certainly this provision is not necessarily repealed by anything to be found in the first two sections of the act of June last.

The other provisions of the act of 1846 exempt the owners of canal-boats from the payment of fees or compensation for register, license, or enrollment, and exempt the boats from liability to libel for the wages of the persons employed on board. In fine, its object seems to be to define canal-boats as something not within the scope of the law of the sea; not subject to admiralty and maritime jurisdiction. Enacted for such a purpose, it cannot be considered as repealed by the act of June 29, 1870, which in any view touches only one of its parts; and as it is not repealed in whole, I do not deem it repealed in part.

In my opinion canal boats are not liable to tax under the act of June 29, 1870, any more than they were before its passage. And "*persons who may be employed on board thereof, or in navigating the same,*" are still known to the law by *that designation used in the act of July 20, 1846*, and not as seamen entitled to relief from the marine hospital fund; the act of June 29, 1870, not having enlarged the extent of relief from that fund, as it has not enlarged the scope of taxation by which the fund is to be provided.

To avoid all obscurity, I will, at the risk of something like repetition, add that I do not regard the 7th section as affecting the use of this fund any more than it affects the sources whence it is to be raised.

Very respectfully, your obedient servant,
THOMAS H. TALBOT,
Acting Attorney-General.

Hon. GEO. S. BOUTWELL,
Secretary of the Treasury.

Green Bay and Mississippi Canal Company.

GREEN BAY AND MISSISSIPPI CANAL COMPANY.

Provisions of the act of July 1, 1870, for the improvement of water communication between the Mississippi River and Lake Michigan, construed in reference to the duties of the arbitrators authorized to be appointed thereunder.

DEPARTMENT OF JUSTICE,

October 13, 1870.

SIR: Your letter of the 11th instant calls my attention to section 2 of the act of Congress approved July 7, 1870, entitled "An act for the improvement of water-communication between the Mississippi River and Lake Michigan, by the Wisconsin and Fox Rivers;" and you request my opinion upon the point whether the arbitrators are not to report to your Department the sum which in justice ought to be paid to the Green Bay and Mississippi Canal Company, for the transfer to the United States of its property and rights therein described, and whether their duty in that respect is, in any particular, modified or abridged by the terms of the proviso to said section.

The 2d section authorizes the Secretary of War to ascertain the sum which ought in justice to be paid to the said company as an equivalent for the transfer of its property and rights of property in and to the line of water communication between the Wisconsin River and the mouth of the Fox River, including its locks, dams, canals, and franchises, or so much of the same as shall, in the judgment of the Secretary, be needed; and to that end, he is authorized to join with said company in appointing a board of arbitrators, one of whom shall be selected by the Secretary, another by the company, and a third by the two so selected. To this section is added the proviso, "That in making their award, the said arbitrators shall take into consideration the amount of money realized from the sale of lands heretofore granted by Congress to the State of Wisconsin to aid in the construction of said water communication, which amount shall be deducted from the actual value thereof, as found by said arbitrators."

It is a settled rule of construction that all parts of a legis-

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lative act shall have effect, if possible, and under this rule nothing short of the most inexorable necessity would justify the expositor of this statute in holding that the proviso above quoted is without meaning. I find no such necessity. It appears to me that, taking the body of the section and the proviso together, the arbitrators will find no difficulty in ascertaining what their duty is. In the first place, they should ascertain the value of the property of the company, including its rights and franchises, which is to be transferred to the United States. Then they should ascertain the amount of money which has been realized from the sale of lands heretofore granted by Congress to the State of Wisconsin to aid in the construction of said water communication. And this latter amount should be deducted from the actual value of the property to be transferred.

The purpose of Congress is plain. The property of the company is to be taken by the Government, and the company is to be paid for it. But the value of that property has been increased by a donation heretofore given by Congress to the State of Wisconsin, (which donation, I understand, has been by the State transferred to the company,) and Congress was unwilling that the Government should pay to the company the value of what the company has received from the Government's donation, and, therefore, it is provided that such amount shall be deducted from the actual value of the property to be transferred. I am of opinion that the award of the arbitrators should state the actual value of such property, and should also state the amount of money realized from the sale of lands heretofore granted to the State for the above purpose, and then the subtraction of the latter amount from the former will show how much is to be paid to the company in the event that Congress, under the provisions of the 3d section, should elect to take the property for the amount thus awarded.

It cannot be the office of the words "in justice," on which parties who take an interest in the matter lay great stress, to render the proviso to the 2d section nugatory. The rule of justice prescribed in the statute is simply this: that the company shall receive from the Government the actual value

Deputy Treasurer at Assay Office, New York.

of its property, diminished by the amount of the contribution which the Government has previously made to that value.

I am, sir, with great respect, your obedient servant,

A. T. AKERMAN.

Hon. WILLIAM W. BELKNAP,

Secretary of War.

DEPUTY TREASURER AT ASSAY OFFICE, NEW YORK.

The compensation approved by the President for the deputy treasurer at the assay office in New York, which is the same in amount as that allowed under existing laws to the treasurer of the branch mint at San Francisco, is allowable under section 10 of the act of March 2, 1853.

DEPARTMENT OF JUSTICE,

October 13, 1870.

SIR : Your communication of the 10th instant, and the inclosed letter from the First Comptroller to you, call for my opinion upon the question whether the compensation approved by the President for the deputy treasurer at the assay office in New York, under section 10 of the act of March 2, 1853, (10 Stat., 212,) is legal.

Under that section the Secretary of the Treasury, with the approbation and consent of the President, appoints such officers and clerks in the assay office, other than the treasurer, as shall be necessary for the proper conduct and management of the said office, and of the business pertaining thereto, at such compensation as shall be approved by the President, provided that the sum shall not exceed that allowed for corresponding services under existing laws relating to the Mint of the United States and its branches. The compensation which has been fixed for the deputy treasurer is four thousand five hundred dollars, the same amount which is allowed under existing laws to the treasurer of the branch mint at San Francisco.

In approving and consenting to the appointment of the deputy treasurer, and in fixing his compensation, the President has substantially determined that his services correspond to those performed by the treasurer of the mint at San Francisco, and the said section, properly construed, refers that

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matter to his determination. The accounting officers of the Treasury should, therefore, consider that matter as settled by competent authority, and should hold that the compensation prescribed for the deputy treasurer is legal and duly payable to that officer.

I am, sir, with great respect, your obedient servant,
A. T. AKERMAN.

Hon. GEORGE S. BOUTWELL,
Secretary of the Treasury.

OTTAWA UNIVERSITY, KANSAS.

The board of trustees of the Ottawa University, of which J. S. Emery was elected a member in January, 1869, and subsequently chosen president, was legally constituted under the provisions of the treaty with the Ottawa tribe of Indians of June 24, 1862.

The words, "the said Ottawa Indians," used in the 6th article of that treaty, mean certain individual Indians therein named, and not the whole tribe in its tribal capacity.

DEPARTMENT OF JUSTICE,
November 10, 1870.

SIR: The Hon. J. D. Cox, late Secretary of the Interior, in his communication dated the 12th of October, 1870, requested my opinion upon certain questions relating to the Ottawa University in Kansas.

The material facts in the case are the following: In December, 1860, the Ottawa tribe agreed in writing with the trustees of the Roger Williams University, a denominational institution of learning incorporated by the legislature of Kansas, to give to the university twenty thousand acres of land on certain conditions, the principal of which was that the university should educate a number of the Ottawa children. Among the councilmen of the tribe who signed this agreement were John T. Jones, James Wind, George Wilson, Joseph King, and William Hurr. Among the signers on the part of the trustees was J. S. Halleck; J. S. Emery was the witness to the instrument.

On the 24th day of June, 1862, a treaty was executed between the Ottawa tribe and the United States, (12 Stat., 1237.) By the sixth article twenty thousand acres of land

Ottawa University, Kansas.

were to be set apart for endowing a school for the benefit of the Ottawas. One additional section of land upon which the school was to be located was also to be set apart. Five thousand acres might be sold by the trustees named in the treaty, and the proceeds applied to the erection of buildings and improvements upon said section. The interest of the proceeds of the sale of the remaining fifteen thousand acres was to be applied to the support of the school, but the principal was not to be diminished. I now quote from the treaty the paragraph upon which controversy has arisen. John T. Jones, James Wind, William Hurr, Joseph King, who are Ottawas, and John G. Pratt, and two other citizens of Kansas who shall be elected by the said Ottawa Indians, are by the parties agreed to be trustees to manage the funds and property by this article set apart. They and their successors shall have the control and management of the school and the funds arising from the sale of lands set apart therefor, and also the reserved section whereon the school is situated. Upon the death, resignation, or refusal to act, by either of them, the vacancy shall be filled by the survivors, provided that the board of trustees shall always have three white citizens members of said board. "A majority of the trustees shall form a quorum to transact business, but there shall be two of the white trustees present at the transaction of business." On the 20th of August, 1862, C. C. Hutchinson and John W. Young were elected trustees by the four Indian trustees named in the treaty. The other members of the tribe had no agency in the matter, and the election was not submitted for their ratification. The board thus constituted was formally organized by the election of James Wind, president; Joseph King, secretary; and John T. Jones, treasurer. This board of trustees sold five thousand acres of said school lands, the proceeds of which were to be devoted to the erection of proper buildings and improvements upon the reserved school section, for the reception of pupils. In May, 1863, Young resigned as trustee, and Hallack was elected by the board in his place, and Wind resigned the presidency, and Hallack was elected in his place. A building committee, appointed by the board, expended during that season the money received from the sale of the five thousand acres, in the partial erection of a school building.

Ottawa University, Kansas.

In January, 1865, Hallack, Hutchinson, Wind, King, Hurr, Jones, and Pratt, professing to act under a law of Kansas authorizing corporations, filed in the probate court of Franklin County, of that State, a petition setting forth their desire to become a body corporate, to be located in the town of Ottawa, and to be designated as the Ottawa University.

They subsequently dropped the organization of Roger Williams University and adopted that of Ottawa University in its stead. In 1866, the board contracted for the completion of the buildings and improvements of the school farm. After various changes in the composition of this board, in January, 1869, J. S. Emery was elected a trustee. He now acts as president of the board. This board of trustees, for convenience sake, I denominate the Emery board. On the 23d of February, 1867, a treaty was concluded between the United States and several tribes of Indians, including the Ottawas, (15 Stat., 518,) by the 19th article of which it is provided that the 6th article of the preceding treaty should remain unchanged, except as provided by that (the 19th) article.

The Secretary of the Interior and the senior corresponding secretary of the American Baptist Home Mission Society were made *ex-officio* members of the board of trustees, with the power to vote in person or by proxy.

The 20th article provided for the sale of the remaining unsold portions of the trust land of the Ottawas to the trustees of the Ottawa University, to be disposed of for the benefit of said institutions, provided the said trustees should furnish within thirty days after the ratification of this treaty, to the Secretary of the Interior, a satisfactory bond for the fulfillment of their obligations. Said bond was filed.

At a meeting of the Ottawa tribe of Indians, held July 13, 1869, they declared that the election of Hutchinson and Young as trustees, in August, 1862, was illegal and void, alleging that the Indians as a tribe had never participated in or confirmed the election of said trustees. They elected Wilson Shannon and A. M. Blackledge as trustees, to act under the 6th article of the treaty of 1862. These persons afterward met together with James, Wind, Joseph King, and William Hurr, and organized as a board, electing Shannon president and Blackledge treasurer. This board I designate as the Shannon board.

Ottawa University, Kansas.

The controversy is between the Emery board and the Shannon board, each claiming to be the lawful trustees of the Ottawa University, and entitled to be recognized by the Government as such. My opinion is desired upon the question—Was the first board of trustees (the Emery board) legally constituted under the treaty first above mentioned; or, in other words, were the two other citizens of Kansas to be elected trustees, for the purpose mentioned in said treaty, by the Ottawa tribe of Indians, or by the said Jones, Wind, Hurr, and King?

I am of the opinion that the first board was legally constituted, and that the words "the said Ottawa Indians," as used in the 6th article of the treaty of 1862, in the paragraph above quoted, means the said Jones, Wind, Hurr, and King, and not the whole Ottawa tribe in its tribal capacity.

While the words, taken by themselves, might, without violence of construction, be held to mean either the Indians as a tribe, or the four individual Indians named in the beginning of the sentence, the reasons in favor of the latter signification are preponderating and conclusive. No tribal action by the Ottawas seems to be contemplated in any provision of the article of the treaty in which said paragraph occurs.

The argument that the interest of the Ottawa tribe in the education of their children would require that the whole tribe should be the constituents of the trustees is overcome by the consideration that the four Indian trustees and one white trustee (five out of seven) are personally designated in the treaty, and no good reason appears why the tribe should be summoned to elect two white trustees when not allowed to elect the remaining white trustee or the four Indian trustees who were thus designated. The treaty on the part of the Ottawas was not made by the tribe as a body, but by five chiefs and head men, of whom Jones, Hurr, and Wind, three of the persons appointed trustees, were a majority, and it is as reasonable that they, in connection with King, should designate two white trustees, as that they, in connection with two other Indians, should, on the part of the Indians, designate five trustees out of seven.

The election of the two remaining white trustees was made by the four-named Indians on the 20th of August, 1862, within

Ottawa University, Kansas.

less than two months from the negotiation of the treaty, and in less than one month from the promulgation of its ratification. Jones, Hurr, and Wind, three of the persons acting in this election, were among the negotiators of the treaty on the part of the Indians, and are not likely to have misunderstood the meaning of the parties to it in so important a particular.

For the space of nearly seven years the only corporate action was by the board of trustees thus originally organized. In much of this action Wind, King, and Hurr participated, and I am not advised of any manifestation by them of any consciousness that their said action was unauthorized until, in July or August, 1869, they appear with Shannon and Blackledge as organizing another and rival board.

The treaty of February 23, 1867, in article 20, provides for a sale of certain trust lands of the Ottawas to the trustees of the Ottawa University. The only persons then known by that description were the board which I have designated as the Emery board. The only bond furnished to the Secretary of the Interior, as required by that article, was furnished by the Emery board.

The counsel for the Shannon board have insisted before me that the treaty of 1867, in its references to the trustees, referred to a board of trustees to be thereafter organized. But the provision in the 20th article, that the bond should be furnished in thirty days after the ratification of the treaty, proves that a body already in existence, or at least one which could promptly be brought into existence, was the body intended, and the Shannon board never came into existence until about two years after the ratification of the treaty.

The two Secretaries of the Interior, (Messrs. Browning and Cox,) who have acted as *ex-officio* members of the board of trustees under the provision of article 19 of the treaty of 1867, have been represented by proxy in the Emery board, and not at all in the Shannon board.

All these facts demonstrate that the construction which I have put upon the language quoted from the treaty of 1867 is in harmony with the understanding of all interested parties at the time the treaty was made, with the understanding of the United States Government ever since, and with the understanding of the Indians themselves until 1869.

Funeral Expenses of Naval Officers.

The answer which I have given to the first question in the Secretary's letter makes an answer to the other question unnecessary.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. C. DELANO,

Secretary of the Interior.

FUNERAL EXPENSES OF NAVAL OFFICERS.

By act of July 15, 1870, the allowance of funeral expenses of a naval officer who died in the United States is prohibited; but such expenses are allowable where the officer died in a foreign country, to an amount not exceeding his sea pay for one month.

The fact that the officer had started on a foreign service, but died in a port of the United States at which his vessel had touched, does not relieve the case from the prohibition of the statute.

DEPARTMENT OF JUSTICE,

November 17, 1870.

SIR: Captain N. B. Harrison, of the Navy, died in the United States, at Key West, in Florida, in October last, and was buried there. In your communication of the 15th instant, my opinion is requested upon the question whether his burial expenses can be paid by the United States.

The Navy Regulations, (article 1503,) established in March last, authorize the payment of such expenses by the Government, when sanctioned by the Navy Department; but the act of Congress of July 15, 1870, making appropriations for the naval service for the year ending June 30, 1871, and for other purposes, (16 Stat., 334,) repeals the Navy Regulations in that particular, in this explicit provision: "nor shall any funeral expenses of a naval officer who died in the United States * * * be allowed." The same section of the act directs that the funeral expenses of any officer dying in a foreign country, not exceeding his sea pay for one month, shall be defrayed by the Government.

Captain Harrison had started on a foreign service, but died in a port in the United States at which his vessel had touched. I cannot think that his foreign destination can overrule the letter of the statute. The law makes the liability

Prevention of Obstructions to Navigation.

of the Government for funeral expenses to depend on the place where the officer dies, and not upon the nature of his service; and Captain Harrison having died in the United States, his funeral expenses are not chargeable to the Government.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. GEORGE M. ROBESON,

Secretary of the Navy.

PREVENTION OF OBSTRUCTIONS TO NAVIGATION.

In view of the practical difficulties of preventing the obstructions to navigation mentioned in the following case by a resort to legal proceedings, advised that the attention of the proper committee of Congress be called to the subject, and penal legislation recommended.

DEPARTMENT OF JUSTICE,

November 17, 1870.

SIR: I have the honor to acknowledge the receipt of your letter of the 14th instant, inclosing a communication to you from Brigadier-General A. A. Humphreys, Chief of Engineers, with several inclosures.

These papers show that the navigation of the Hudson River at certain points near Albany, New York, has been obstructed by great quantities of ashes, clinker, slate, and other substances thrown overboard from the steamboats that navigate the river. The obstructions thus caused are represented as increasing and threatening very serious hinderance to the navigation of the river.

General Humphreys refers to the opinion of Attorney-General Cushing in the case of the Waukegan breakwater, (6 Opins., 72,) that a public nuisance to navigable waters, though within the limits of a State, may be abated by an information and a bill for injunction filed by the Attorney-General in the proper court of the United States.

Such a proceeding, if maintained, however applicable to a case when the obstruction was a single object, like the bridge near the Waukegan breakwater, would not effect the removal of the obstructions caused in the Hudson River in the man-

Legislature of Dakota.

ner above shown. An injunction might prevent the increase of the obstructions, if it could be known in advance what steamers were likely to continue the mischief.

But the impossibility of finding proper parties to such proceedings creates an insuperable objection to resorting to them in this case.

I take the liberty of suggesting that the attention of the proper committee of Congress be called to the subject, and that legislation be recommended making it penal to empty such matter into the river.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. Wm. W. BELKNAP,

Secretary of War.

LEGISLATURE OF DAKOTA.

By force of the provisions of the act of March 3, 1869, prescribing the terms of members of territorial legislatures, and regulating the sessions of such legislatures, the election of members of the legislature of Dakota Territory, held in October, 1870, was invalid.

The legislature of that Territory chosen in October, 1869, is the lawful legislature for the space of two years from the commencement of its term.

DEPARTMENT OF JUSTICE,

November 17, 1870.

SIR: I have the honor to acknowledge the receipt of your letter of the 15th instant, transmitting a copy of a letter from the secretary of the Territory of Dakota of the 5th instant in regard to the legality of the election of legislative officers in that Territory held in October last.

According to the law organizing the Territory of Dakota, of March 2, 1861, (12 Stat., 240,) one body of the assembly (the council) was chosen for the term of two years, and the other (the house of representatives) for the term of one year. The act of March 3, 1869, "making appropriations for the legislative, executive, and judicial expenses of the Government for the year ending June 30, 1870," (15 Stat., 300,) provides "that hereafter the members of both branches of the legislative assemblies in the several Territories shall be chosen for the term of two years, and the sessions of the

Legislature of Dakota.

legislative assemblies shall be biennial; and each territorial legislature shall, at its first session after the passage of this act, make provision by law for carrying this act into effect."

In October, 1869, both branches of the legislature in Dakota were elected. I am not advised that there has been any session of the legislature of the Territory since the passage of the act of March 3, 1869; but I infer from the letter of the secretary of the Territory that no such session has been held.

In most of the counties of the Territory an election was held in October, 1870, at which members of the legislature were chosen. I suppose that this election was held in pursuance of the territorial law existing at the time of the act of March 3, 1869. The question upon which my opinion is requested is whether this last election was legal.

I think that this last election was of no validity whatever. The act of March 3, 1869, is clear and positive. No question could arise upon the meaning of it, but for the clause requiring the territorial legislature, at its first session after the passage of the act, to make provision by law for carrying this act into effect. This clause is not susceptible of a literal construction. The act in which the clause occurs makes appropriations for the legislative, executive, and judicial expenses of the Government of the United States for the year ending June 30, 1870; and of course it was not intended that the territorial legislatures should carry into effect all its provisions. Restricting the clause to the provision in relation to the legislative assemblies of the Territories, (to which alone it was doubtless meant to apply,) I cannot suppose that Congress intended that the main objects of the legislation—the establishment of biennial elections and biennial sessions—should depend upon the action of the territorial legislatures.

I construe the whole as meaning that the elections and the sessions thereafter to be held should be biennial; that the first election and the first session should be held at the time prescribed by the law of the Territory existing in March, 1869; and that the legislature which should first assemble thereafter should fix the time for future elections and for future sessions, taking care that both should be biennial.

By this construction, the manifest purpose of Congress as to the term of the legislative bodies and frequency of sessions

Fort Snelling Military Reservation.

is accomplished, and the minor arrangements made necessary by this change are left to the legislatures of the Territories.

While nothing is more improbable than that Congress intended to authorize the territorial legislatures to overrule its own will, nothing is more probable, or more conformable to precedent, than that Congress, having given the general directions, should purposely commit the regulation of the details to bodies familiar with local convenience.

Hence I am of the opinion that the legislature chosen in October, 1869, is in both branches the lawful legislature of the Territory for the space of two years from the commencement of its term, and that its successor should be chosen in 1871, at a time to be fixed at its first session.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. HAMILTON FISH,
Secretary of State.

FORT SNELLING MILITARY RESERVATION.

The Secretary of War has authority, under the resolution of Congress of May 4, 1870, to carry out the agreement entered into by him respecting the military reservation at Fort Snelling, Minnesota, by making conveyances and accepting releases as provided in that agreement.

DEPARTMENT OF JUSTICE,

November 30, 1870.

SIR: The question which you have addressed to me in reference to the military reservation at Fort Snelling, Minnesota, grows out of the following facts:

On the 6th day of June, 1857, Major Seth Eastman and William King Heiskell, as agents of the United States, entered into articles of agreement with Franklin Steele for the sale to said Steele of that reservation, excepting about thirty acres described by metes and bounds, for the sum of \$90,000, one-third payable on the 10th day of July, 1857, and the residue in two equal annual payments thereafter. Possession was to be given as soon as the Secretary of War

Fort Snelling Military Reservation.

could dispense with the land for military purposes, and a deed was to be given when the first payment should be made and satisfactory security for the deferred payments should be given.

This contract was approved by John B. Floyd, Secretary of War. The first payment was made. In July, 1858, by order of the War Department, Steele was put in possession of the property. In April, 1861, possession was taken by the military authority of the United States, which has ever since held it.

When this sale became public, it was denounced as fraudulent, and Congress took some inconclusive proceedings in the matter. The purchaser failed to pay the deferred payments according to contract. He has presented claims against the Government for the use and occupation of the property, amounting to more than the deferred payments and the interest accrued thereon. No deed has been executed on the part of the United States.

The sale was made under the supposed authority of the act of March 3, 1819, entitled "An act authorizing the sale of certain military sites," and of the 4th section of an act approved March 3, 1857, entitled "An act making appropriations for the support of the Army," &c.

The act approved June 12, 1858, entitled "An act making appropriations for the support of the Army," &c., repealed all existing laws which authorized the sale of military sites.

On the 4th day of May last, Congress adopted the following joint resolution :

"*Resolved*, &c., That the Secretary of War be, and hereby is, authorized and empowered to select and set apart for a permanent military post so much of the military reservation of Fort Snelling, not less than one thousand acres, as the public interests may require for that purpose, and to quiet the title to said reservation, and to settle all claims in relation thereto, and for the use and occupation thereof, upon principles of equity."

In pursuance of this resolution, you have selected and set apart for a permanent military post fifteen hundred and twenty-one and twenty one-hundredths acres of the reservation, described by proper metes and bounds, being all

Fort Snelling Military Reservation.

that in your opinion the public interests require for that purpose.

And you have agreed with said Steele, and the other parties interested with him in the property, that, upon their full release to the Government of all claim, title, and demand whatsoever of, in, to, or upon, the property so selected and set apart, and for the use and occupation thereof, and the use and occupation of the remainder of said property, so sold as aforesaid, the Government will receive the same in full payment and discharge of the indebtedness of said Steele and his associates, on account of said purchase, and will convey to said Steele, or to him and his associates, or to whomsoever he and they may direct, all the lands embraced in said military reservation except the part selected and set apart as aforesaid.

The question which you submit to me is this: Are you authorized, under existing laws, on the execution of the release above provided for, to carry out the agreement above recited with said Steele and his associates, by making, executing, and delivering all needful instruments conveying and transferring in fee the premises so agreed to be conveyed?

Without inquiring into the validity of the sale in July, 1857, or the effect of the repealing act of June 12, 1858, upon that sale, I am of opinion that the joint resolution of May last fully authorizes you to carry out the agreement which you have made, and to execute all necessary conveyances of the premises according thereto. Congress has given you the authority, after selecting not less than one thousand acres for a permanent military post, "to quiet the title to said reservation, and to settle all claims in relation thereto, and for the use and occupation thereof."

This authority is sufficient for the agreement which you have made, and for the consummation of that agreement. The authority to quiet the title (the title having been in controversy) fully warrants you in executing conveyances to the purchasers and receiving conveyances to the Government. It is seldom, if ever, that a disputed title can be quieted without a conveyance from one or the other or both of the parties to the controversy, and I have no doubt that it was the intention of Congress, by the very broad language of the

Navy-Pension Fund.

resolution, to empower you to make such conveyances and to receive releases.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. Wm. W. BELKNAP,

Secretary of War.

NAVY PENSION FUND.

Opinion of August 1, 1870, (ante, p. 299,) reconsidered upon additional matter submitted, and the conclusions arrived at in that opinion re-affirmed.

DEPARTMENT OF JUSTICE,

December 6, 1870.

SIR : A letter from the Hon. W. T. Otto, Acting Secretary of the Interior, dated the 17th of November last, asks for a reconsideration of the opinion expressed in my letter to the Secretary of the Interior of the 1st of August, 1870, upon the question whether the Secretary was authorized to issue a requisition for the transfer of certain moneys in the Treasury as a part of the Navy-pension fund and the prize-money fund. The ground upon which this reconsideration is asked, is that papers have been received in the Department of the Interior which are supposed to establish the fact that the decree of the district court for the southern district of Illinois, by which the moneys in question were paid to the Navy-pension fund, was not final, and, therefore, that said moneys were subject to be distributed by the court in the subsequent decree.

Accordingly I have reconsidered the subject under all the additional light furnished by the papers transmitted to me, and the argument of counsel for the captors.

From the record of the district court it appears that on the 18th day of June, 1868, a decree was made, founded upon the report of a special commissioner, in the following case :

"The United States vs. Six Hundred and Fifty Bales Cotton, Fifty-two Sacks of Cotton, Four Hundred and Nine Bales, One Hundred and Fifty-nine Sacks of Cotton, and One Thousand Bales of Cotton. In prize."

This decree recited that the net proceeds of nine hundred

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and twenty-four bales of the cotton libeled and sold in that case were then on deposit in the office of the assistant treasurer of the United States at Saint Louis, subject to the order of the court; that the gross proceeds of said bales amounted to three hundred and ninety-four thousand four hundred and forty-seven dollars and fifty-four cents; that certain sums had been allowed and paid out of said gross proceeds for costs and expenses, leaving as subject to the order of court the sum of three hundred and forty-two thousand four hundred and fifty-three dollars and twenty cents; that decrees in favor of divers claimants of the proceeds of portions of the cotton had been rendered in the case, all which decrees are recited and described. It was thereupon decreed that certain amounts of said moneys should be applied to the payment of said decrees..

Then follows this language: "And it appearing to the court that after payment of the above several decrees, costs, and expenses, there remained on deposit with the assistant treasurer of the United States at Saint Louis, subject to the order of the court, the sum of seventy-five thousand one hundred and fourteen dollars and sixty-one cents, of which amount the court directs that there be paid to the Navy Department, for the benefit of the captors, the sum of forty-two thousand seven hundred and four dollars and seventy cents; and, to the Navy-pension fund, the sum of thirty-two thousand four hundred and nine dollars and eighty-six cents."

It is then certified that certain vessels participated in the capture, and that certain adjustments among the respective vessels are directed.

The above is a summary of what is certified by the clerk as a full, true, and complete transcript of the decree of distribution made in the case of *The United States vs. Nine Hundred and Twenty-four bales of Cotton*.

It seems to me that this decree was final as to the whole sum of which it disposed; as final in regard to the sum decreed to the Navy-pension fund as to the sums decreed for costs, and to claimants and to captors.

At a subsequent term of the court, more than sixteen months after the foregoing decree was rendered, to wit, on

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the 1st day of November, 1869, the following decree was rendered, and it is upon this decree that the money formerly decreed to the naval-pension fund is sought to be withdrawn.

"Decrees having been rendered herein on the 18th day of June, A. D. 1868, directing the payment into the Treasury of the United States of the sum of forty-two thousand seven hundred and four dollars and seventy cents, to be distributed to the captors named therein, as military salvage, and the further sum of thirty-two thousand four hundred and nine dollars and eighty-six cents to the credit of the naval-pension fund ;

"And it appearing to the court from the letter of John A. Bolles, Solicitor-General of the Navy Department, to W. S. Taylor, attorney for the captors of the Mississippi squadron, of date September 13, 1869, on file herein, and from the professional statement of W. S. Taylor, attorney for the captors, made to the court, that the said Solicitor-General of the Navy Department is of the opinion that the said sum of thirty-two thousand four hundred and nine dollars and eighty-six cents, paid into the Treasury of the United States in accordance with said decree, ought to be given to the captors :

"It is therefore ordered, adjudged, and decreed by the court, that the said decrees rendered herein on the 18th day of June, A. D. 1868, be so modified that the said sum of thirty-two thousand four hundred and nine dollars and eighty-six cents, therein decreed to be paid to the naval-pension fund, instead thereof be distributed as military salvage to the captors named in said decree.

"It is further ordered, adjudged, and decreed by the court, in accordance with the request of Vice-Admiral David D. Porter, on file herein, that there be allowed and paid out of said sum of thirty-two thousand four hundred and nine dollars and eighty-six cents, to W. S. Taylor, attorney for the captors of the Mississippi squadron, for his services in behalf of the captors herein, a sum equal to 10 per cent. thereof."

I need not remark upon the peculiar grounds upon which the court reversed its former decree. But looking to the question of jurisdiction alone, I am unable to see how the court could lawfully acquire a jurisdiction to dispose anew,

Kansas Pacific Railway Company.

in November, 1869, of moneys of which it had disposed by the decree of June, 1868, which last-mentioned decree had been carried into execution. I am unable to see how the court could withdraw the money in question from the naval-pension fund without being equally able to withdraw the other moneys disposed of by the decree of June, 1868, from the pockets of the captors, claimants, or officers of court. Unless such decrees are held to be final as to the moneys of which they dispose, courts are idly employed in rendering them. But I do not think that the practice of the courts of the United States is subject to any such reproach. I therefore remain of the opinion expressed in my letter of August 1, 1870.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. C. DELANO,

Secretary of the Interior.

KANSAS PACIFIC RAILWAY COMPANY.

The provisions of the 5th section of the act of July 2, 1864, amendatory of section 6 of the act of July 1, 1862, requiring one-half of the compensation for services rendered for the Government by the Kansas Pacific Railway Company to be applied to the payment of the bonds issued by the United States in aid of the construction of the road of that company, include services performed on that portion of the road in respect of which no bonds were issued by the Government, as well as services performed on the particular portion of the road in respect of which bonds were issued thereby.

DEPARTMENT OF JUSTICE,

December 9, 1870.

SIR: From your letter of the 22d ultimo, the following facts appear:

On the 19th of November, 1870, an order was issued from the Post-Office Department to recognize the service of the Kansas Pacific Railway Company in conveying the mails at certain specified rates, "subject to fines and deductions and the provisions of the 5th section of the act approved July 2, 1864, (13 Stat., 356,) which provides that one-half the pay for the mail service performed shall be applied to the pay-

Kansas Pacific Railway Company.

ment of the bonds issued by the Government in aid of the construction of the road."

Mr. Keiff, the agent of the company, claims that the order should be modified so far as it applies to the provisions of the 5th section of the act of July 2, 1864, to the service to be rendered on that part of the line of the Kansas Pacific Railway between the 394th mile-post west of the Missouri River and Denver. The ground of his claim is that the Government issued no bonds to aid in the construction of that part of the road, having stopped its subsidy at or near the mile-post above mentioned.

I am of the opinion that Mr. Keiff's claim is not well founded. The provision of the act of 1864, amending the act of July 1, 1862, section 6, (12 Stat., 489,) is that one-half of the compensation for services rendered for the Government by said company shall be required to be applied to the payment of the bonds issued by the Government in aid of the construction of said road. There is nothing which limits this application of the half compensation to the moneys earned on that part of the road which should be directly aided by the issue of the Government's bonds.

The particular portion of the road to which the aid of the Government was immediately applied, is of no consequence in determining the general liability of the road. The road built by this company is a whole. Aid by the Government applied to one part of it makes the company just so much the abler to build the other parts of it. The service rendered by the company to the Government, in transporting mails or otherwise, is also a whole for the purpose of this inquiry, and a restriction of the reserved compensation to the earnings on one part of the road, because the aid of the Government was given directly to that part, seems to me to be required neither by law nor justice.

The object of Congress in directing that bonds should be issued at the rate of so much per mile, was to prevent imposition upon the Government by an issue of bonds beyond a reasonable risk.

It seems to have been the purpose of Congress that when a road is aided at all by bonds issued by the United States, one-half of what the road, in any part of it, may earn for

Muster-out of Army Officers.

service to the Government shall be applied to the re-imbursement of the United States for such aid. A diminution of the amount reimbursed in this way would merely delay the discharge of a just debt from the company to its benefactor.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. J. A. J. CRESWELL,
Postmaster-General.

MUSTER-OUT OF ARMY OFFICERS.

Where an officer of the Army has been reported to, and found unfit for the proper discharge of his duties by, the board of officers constituted under the provisions of the 11th section of the act of July 15, 1870, and, after having been allowed a hearing before the board, is recommended by the board to be mustered out of the service, it is the duty of the President to carry such recommendation into effect.

DEPARTMENT OF JUSTICE,
December 14, 1870.

SIR : The 11th section of the act of July 15, 1870, entitled "An act making appropriations for the support of the Army for the year ending June 30, 1871, and for other purposes," (16 Stat., 318,) provides for the constitution of a board of officers, who shall consider the cases of officers reported by the General of the Army and commanding officers of the several military departments as unfit for the proper discharge of their duties; and further provides that, "on recommendation of such board, the President shall muster out of the service any of the said officers so reported, with one year's pay, but such muster-out shall not be ordered without allowing such officer a hearing before such board to show cause against it."

The question which you submit to me is, Whether the President has a discretion in acting upon the recommendation of the board, or whether such recommendation compels him to muster out the officer in question ?

The language of the statute being mandatory and positive, I think that no discretion is reserved to the President, and that when the reported officer has been allowed a hearing

Choctaw Indians.

before the board, and the board recommends that he be mustered out, the President must carry the recommendation into effect.

Very respectfully, your obedient servant,

A. T. AKERMAN.

To the PRESIDENT.

CHOCTAW INDIANS.

The act of March 3, 1865, withdrew from the Secretary of the Treasury the authority given him by the act of March 2, 1861, to issue to the Choctaw tribe of Indians bonds of the United States to the amount of \$250,000. But that authority was revived by the treaty with said tribe of April 28, 1866, under which the Secretary may lawfully issue the bonds to the Choctaws, as provided in the above-mentioned act of March 2, 1861. Under the Constitution, treaties as well as statutes are the law of the land; both the one and the other, when not inconsistent with the Constitution, standing upon the same level and being of equal force and validity; and, as in the case of all laws emanating from an equal authority, the earlier in date yields to the later.

DEPARTMENT OF JUSTICE,

December 15, 1870.

SIR: In answering the question propounded in your letter of the 29th of September, 1870, it is necessary that I should consider a series of treaties and statutes.

In the treaty of June 22, 1855, with the Choctaw and Chickasaw Indians, (11 Stat., 611,) it was provided that certain claims of the Choctaws against the United States, set up under a prior treaty, should be submitted for adjudication to the Senate of the United States. The Senate does not appear to have ever adjudicated the claim by any separate action; but in the Indian appropriation act of March 2, 1861, it was provided that there should be paid "to the Choctaw Nation or tribe of Indians, on account of their claim under the 11th and 12th articles of the treaty with said nation or tribe made the 22d of June, 1855, the sum of \$500,000; \$250,000 of which sum shall be paid in money; and for the residue the Secretary of the Treasury shall cause to be issued to the proper authorities of the nation or tribe, on their requisition, bonds of the United States authorized at the present session of Congress: *Provided*, That in the future adjustment of the

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claim of the Choctaws, under the treaty aforesaid, the said sum shall be charged against the said Indians." (12 Stat., 238.)

In the Indian appropriation bill of July 5, 1862, (12 Stat., 528,) it was provided "that all appropriations heretofore or hereafter made to carry into effect treaty stipulations or otherwise in behalf of any tribe or tribes of Indians, all or any portion of whom shall be in a state of actual hostility to the Government of the United States, including the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, Wichitas, and other affiliated tribes, may and shall be suspended and postponed wholly or in part at and during the discretion and pleasure of the President;" and the President was further authorized to expend any unexpended part of previous appropriations for the benefit of said tribes, for the relief of such individual members of the tribes as had been driven from their homes and reduced to want on account of their friendship to the Government.

In the Indian appropriation act of March 3, 1865, (13 Stat., 562,) the Secretary of the Treasury is authorized and directed in lieu of the bonds for the sum of two hundred and fifty thousand dollars appropriated for the use of the Choctaws in the act of March 2, 1861, "to pay to the Secretary of the Interior two hundred and fifty thousand dollars for the relief and support of individuals of Cherokees, Creek, Choctaw, Chickasaw, Seminole, Wichita, and other affiliated tribes of Indians, who have been driven from their homes and reduced to want on account of their friendship to the Government."

On the 28th of April, 1866, a treaty was made with the Choctaw and Chickasaw Indians, (14 Stat., 769,) the 10th article of which is in the following words: "The United States re-affirms all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw Nations, entered into prior to the late rebellion, and in force at that time not inconsistent herewith; and further agrees to renew the payment of all annuities and other moneys accruing under such treaty stipulations and acts of legislation, from and after the close of the fiscal year ending on the 30th of June, in the year eighteen hundred and sixty-six." The 45th article is in these words: "All the rights,

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privileges, and immunities heretofore possessed by said nations or individuals thereof, or to which they were entitled under the treaties and legislation heretofore made and had in connection with them, shall be, and are hereby declared to be, in full force, so far as they are consistent with the provisions of this treaty."

The Choctaw Indians have made requisition on the Secretary of the Treasury for bonds of the United States to the amount of two hundred and fifty thousand dollars under the act of March 2, 1861, and the question upon which you desire my opinion is whether such bonds may lawfully be issued to them.

Without considering the effect of other legislation on the subject, I am of opinion that the act of March 3, 1865, withdrew from the Secretary of the Treasury the authority vested in him by the act of 1861 to issue the bonds; and unless that authority is revived in the treaty of July, 1866, it does not now exist. But I am further of opinion that such authority is revived by that treaty, if a treaty can have such effect.

By the treaty the United States re-affirms all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw Nations entered into prior to the late rebellion, and in force at that time. In every reasonable sense of the word obligations, as used in that treaty, the provision in the act of 1861 for issuing the bonds was an obligation. Liberal rules of construction are adopted in reference to Indian treaties, (5 Wall., 760.) It was an obligation which grew out of a treaty stipulation and an act of legislation in part execution of a treaty stipulation. It was entered into prior to the late rebellion. It was in force when the rebellion began. Thus it answers every part of the description in the treaty.

The section of the treaty above quoted, together with others of its provisions, place these Indians, as to all dues from the Government, just as they stood at the outbreak of the rebellion in April, 1861. To re-affirm obligations arising out of a repealed act of legislation must signify the restoration of the parties to the position in which they stood when the act of legislation was in force.

The serious question, however, does not relate to the mean-

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ing, but to the authority, of the treaty of 1866. The statute of March 3, 1865, repeals the direction to the Secretary of the Treasury in the act of March 2, 1861. The treaty undertakes to revive that direction. Is such an act within its competency?

By the 6th article of the Constitution, treaties as well as statutes are the laws of the land. There is nothing in the Constitution which assigns different ranks to treaties and to statutes. The Constitution itself is of higher rank than either by the very structure of the Government. A statute not inconsistent with it, and a treaty not inconsistent with it, relating to subjects within the scope of the treaty-making power, seem to stand upon the same level, and to be of equal validity; and as in the case of all laws emanating from an equal authority, the earlier in date yields to the later.

In 1791 Mr. Madison wrote as follows: "Treaties, as I understand the Constitution, are made supreme over the constitutions and laws of the particular States, and, like a subsequent law of the United States, over pre-existing laws of the United States; provided, however, that the treaty be within the prerogative of making treaties, which, no doubt, has certain limits."—(Writings of Madison, vol. i, p. 524.)

In *The United States vs. The Schooner Peggy*, (1 Cranch, 37,) the Supreme Court of the United States, in an opinion delivered by Chief Justice Marshall, held, in effect, that a treaty changed the pre-existing laws, "and is as much to be regarded by the court as an act of Congress."

In *Foster and Elan vs. Neilson*, (2 Peters, 253,) the Supreme Court say, "Our Constitution declares a treaty to be a law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision;" and in applying this principle to the case before them, say that if the treaty then under consideration had acted directly upon the subject, it "would have repealed those acts of Congress which were repugnant to it."

In *Taylor vs. Morton*, (2 Curtis, C. C. R., 454,) it was held that Congress may repeal a treaty so far as it is a municipal law, provided its subject-matter is within the legislative power of Congress. The just correlative of this proposition would

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seem to be that the treaty-making power may repeal a statute, provided its subject-matter is within the province of the treaty-making power.

Attorney-General Cushing, in 1854, after a full examination of the subject, came to the conclusion that a treaty, assuming it to be made conformably to the Constitution, has the effect of repealing all pre-existing Federal law in conflict with it. (6 Opins., 291.)

Hamilton says: "The treaty power, binding the *will* of the nation, must, within its constitutional limits, be paramount to the legislative power, which is that will; or, at least, the last *law* being a treaty, must repeal an antecedent contrary *law*." (Works of Hamilton, vol. vi, p. 95.) Again: "It is a question among some theoretical writers, whether a treaty can repeal *pre-existing laws*. This question must always be answered by the particular form of government of each nation. In our Constitution, which gives *ipso facto* the force of law to treaties, making them equal with the acts of Congress, the supreme law of the land, a treaty must necessarily repeal antecedent law contrary to it, according to the legal maxim that "*leges posteriores priores contrarias abrogant*."—(Ibid., vol. vii, p. 512.)*

An engagement to pay money is certainly within the province of the treaty-making power, and I cannot perceive that such an engagement is carried beyond that province by the circumstance that it provides for issuing, through the agency of a particular officer, an obligation to pay money at a particular time; for such, in effect, is a bond.

Can the Secretary of the Treasury issue the bonds without a new direction from Congress? In other words, is the treaty a law for him, or can he know no laws except such as are passed by Congress?

The Secretary is an officer of the executive department of the Government. It is established by a long course of authoritative opinion and conforming practice, that in many cases the Executive of the United States can execute the stip-

* In the case of *The Cherokee Tobacco*, (11 Wall., 621,) it is observed by the Supreme Court: "The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt as to its proper solution. A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty."

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ulations of a treaty without provision by act of Congress. In some instances this has been done as a general executive duty, when the treaty itself pointed out no particular mode of execution. This was the course taken in the case of Thomas Nash, otherwise called Jonathan Robbins, who was delivered up by the direction of President Adams to the British authorities in execution of the treaty with Great Britain of 1794. An attempt to bring the censure of Congress upon the President for this act was encountered by an argument from Chief Justice Marshall, then a Representative from Virginia, which conclusively established the power.

In other cases the President has acted when the mode of action was pointed out in the treaty.

In the treaty of Washington of 1842, there was a provision for extradition of criminals. Prior to any legislation for carrying out this provision of the treaty, it was executed by officers of the United States. In 1845, James Buchanan, Secretary of State, issued a warrant for the arrest of certain persons, subjects of Great Britain, who were charged with a crime committed under British jurisdiction and against British laws; and it was decided by Mr. Justice Woodbury, upon the return of a writ of *habeas corpus*, that the warrant and the arrest were legal. (1 Woodbury & Minot's Rep., 66.)

The learned justice remarks: "It is here only on the ground that the act to be done is chiefly ministerial, and the details full in the treaty, that no act of Congress seems to me necessary." (Ibid., 74.)

Attorney-General Nelson, in discussing this treaty, remarks: "It has been made under the authority of the United States, and is the supreme law of the land. It has prescribed, by its own terms, the manner, mode, and authority in and by which it shall be executed. It has left nothing to be supplied by legislative authority, but has indicated means suitable and efficient for the accomplishment of its object. It needs no sanctions other or different from those inherent in its own stipulations, and requires no aid from Congress. Surely, it cannot be necessary to invoke the legislative authority to give it validity by its re-enactment." (4 Opins., 209.) This language may be fitly applied to the treaty with the Choctaws.

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I am aware of the distinction which has been taken between such treaties as do, and such as do not, import a contract, and of the current notion that, in the former case, Congress must act before the treaty can be executed. But the practice of the Government in extradition treaties, and in other sorts of international covenants, has been at variance with this notion.

If the Executive may constitutionally execute a treaty for delivering persons to a foreign jurisdiction, it may well feel authorized by the Constitution to execute a treaty that stipulates for the less important matter of issuing bonds.

According to Article I, section 9, of the Constitution, as construed by the practice of the Government, an act of Congress is necessary to appropriate money to pay the public debt, however created. The change of the form of the debt from a general stipulation in the treaty to bonds with particular provisions does not take away that necessity. The time for the exercise of whatever power Congress has over the subject will come when provision for the payment of the bonds is to be made.

Waiving all discussion of the desirableness, on grounds of expediency, of immediate authority from Congress, and responding to your question according to my judgment of the law of the case, I am of opinion that you may lawfully issue the bonds to the Choctaws.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. GEO. S. BOUTWELL,

Secretary of the Treasury.

UNION PACIFIC RAILROAD COMPANY.

The acts of July 1, 1862, and July 2, 1864, contemplate the re-imbursement of the United States, by the Union Pacific Railroad Company, of the interest on the bonds issued as a subsidy to that company, as and when such interest is paid by the Government.

The Government may retain the entire amount of compensation for services rendered to it by the company, applying the same to the interest paid by the United States, unless such interest shall have been repaid by the company, and in that event, one-half of the compensation for such services may be reserved and applied to the principal of the bonds.

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DEPARTMENT OF JUSTICE,

December 15, 1870.

SIR: I have considered the questions presented in your letters of October 7th and November 23d last, in relation to the claim of the United States on the Union Pacific Railroad Company for re-imbursement of interest paid by the United States on bonds issued as a subsidy to that company.

By the act of July 1, 1862, section 5, (12 Stat., 492,) bonds of the United States were to be issued to the company to the amount of sixteen thousand dollars a mile upon the completion and equipment of each forty miles of the road, payable in thirty years after date, bearing six per centum per annum interest, (the interest payable semi-annually,) and to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds "together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph," &c.

Section 6 provides that the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the Government whenever required to do so by any Department thereof, and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid, (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service;) and all compensation for services rendered for the Government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, Treasury notes, or other evidences of debt against the United States, to be allowed at par; and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof."

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This act was amended by the act of July 2, 1864, (13 Stat., 356,) the 5th section of which provides that only one-half of the compensation for services rendered for the Government by said companies shall be required to be applied to the payment of the bonds issued by the Government in aid of the construction of said roads. Section 10 further provides that the companies participating in the construction of the Pacific Railroad may "issue their first-mortgage bonds on their respective railroad and telegraph lines, to an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate, and character of interest with the bonds authorized to be issued to said railroad companies respectively. And the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property, and equipments, except as to the provisions of the 6th section of the act to which this is an amendment," (the act of 1862 above quoted,) "relating to the transmission of dispatches and the transportation of mails, troops, munitions of war, supplies, and public stores for the Government of the United States."

The Government has issued its bonds to the Union Pacific Railroad Company to the amount of many millions. It has paid the accrued interest on the bonds. Upon an application to the company to re-imburse this interest the company refuses, contending that the Government has no valid claim upon the company for reimbursement of interest until the principal of the bonds shall be due, except as to one-half of the compensation for services rendered by the company for the Government, and as to five per centum of the net earnings of the road after its completion.

If the company is right the Government must go on paying out the interest twice a year, and wait thirty years for its pay, except the probably small amount of one-half the compensation due to the company as a carrier for the Government, and five per centum of the net earnings. The amount which the company will thus owe the Government at the expiration of the thirty years will be nearly treble the principal of the bonds, and more if interest on the paid coupons is chargeable against the company. And while this heavy debt

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shall be accumulating against the company, the Government will all the time be paying to the company one-half of the value of the services rendered to it by the company. Without a wonderful increase in value, there is no probability that the road and all the appurtenant property will be worth at the end of thirty years the thus increased debt then due to the Government, after the first mortgage creditors shall have been satisfied. Meanwhile the company may be paying dividends to its stockholders out of earnings which natural justice would apply to the relief of that creditor through whose benefactions the road had been mainly built. A construction which leads to such results ought not to be adopted unless clearly required by the language of the law.

In considering the subject, I have inquired whether a rule of construction favorable to the Government, or a rule favorable to the company, should be followed where the language of the statute leaves the mind in doubt. Between a grantor for valuable consideration and the grantees, the law adopts a construction most favorable to the latter. Where the transaction is an act of bounty, the construction of doubtful language should be in favor of the donor, (9 Opinions of Attorney's General, 59-60; *Dubuque and Pacific Railroad Company vs. Litchfield*, 23 How., 88.)

I regard the aid to the Union Pacific Railroad Company as substantially an act of bounty on the part of the Government. There is, it is true, something like a valuable consideration in the stipulations for preference to the Government in the business of the road. But when we look at the whole matter, and see how much the Government does for the company, and how little the company is required, in return, to do for the Government, we must conclude that the Government and the company are substantially in the relations of donor and donee.

The company admits a liability to repay principal and interest to the Government; the controversy is as to the time when the interest is to be repaid. In the absence of distinct provisions upon the subject, it would seem just that, as soon as the Government pays money for the company, the company should be bound to re-imburse the Government. This principle of justice is the basis of the common-law action for

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money paid. Is there anything in the aiding acts which makes this principle inoperative here? These acts aid the company both by bonds and by donations of land. The lands are given absolutely, and the titles, as the conditions are complied with from time to time, issued to the company. It was manifestly the intention of Congress that the Government should lose, and that the company should acquire, the lands. But in the case of the bonds the idea of re-imbursement is a standing attendant upon all the provisions for this form of aid.

The 5th section of the act of 1862, in order "to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States," makes the issue and delivery of the bonds to constitute a first mortgage on the road and connected property; and then provides that the Secretary of the Treasury may take possession in case of default. The section does not specify the time when the interest shall be repaid.

The main stress of the argument for the company depends on the first clause of the next section, "the grants aforesaid are made upon condition that said company shall pay said bonds at maturity." As construed by the company, this clause should be read, "the said company shall pay said bonds and interest at the maturity of the principal of the bonds."

But it is observable that at the first mention of re-imbursement in the 5th section, the bonds and interest are severally named. In the language quoted from the beginning of the 6th section, no separate mention is made of interest. If this omission of the mention of interest were designed, the time of repaying interest is not affected by this clause, and is determinable by the other considerations in the case. If the omission were casual, and the word "bonds," as used in the 6th section, embraces interest as well as principal, is it an extravagant stretch of the meaning of the word "maturity" to hold that, as to the principal, it signifies the time when the principal falls due, and, as to the interest, it signifies the times when the interest falls due? Conceding that this is not the more common meaning of the word *maturity* as ap-

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plied to such bonds, I think that there is enough in the whole character of the statutes now under examination to authorize this interpretation of it, as used here, if the clause refers to interest at all. The interest falls due semi-annually, and in fact a separate instrument (a coupon) is issued for each installment of interest. Suppose the not very unusual case of a written obligation to pay money by installments. Speaking of the maturity of that paper, we should mean the several times when the successive installments become due. Each coupon is a separate engagement, and may be sued upon without even producing the bond to which it was originally attached. (*Commissioners of Knox County vs. Aspinwall*, 21 How., 539.)

The 5th section provides that upon the failure of the company to redeem said bonds or any part of them, when required to do so by the Secretary of the Treasury in accordance with the provisions of this act, the said road, with all the rights, franchises, and immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the United States, which, at the time of said default, shall remain in the ownership of the company, may be taken possession of by the Secretary of the Treasury for the use and benefit of the United States.

It is not likely that Congress intended to encumber this important provision with anything unimportant or useless. We must suppose that, in authorizing the Secretary of the Treasury, on the failure to redeem the bonds or any part of them, to take possession of all lands granted to the said company by the United States, which, at the time of said default, should remain in the ownership of the said company, Congress intended to obtain a substantial and valuable security.

The 3d section, which gives to the company five alternate sections a mile on each side of the road, provides that all such lands which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

The object and the certain effect of this provision was to compel the company to sell the granted lands by the end of

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three years from the completion of the road. The 17th section forfeits the whole road to the United States if not completed by the 1st day of July, 1876.

Thus it appears that Congress expected that granted lands of sufficient value to be an important security for the company's debt would be in the possession of the company at the time when a default might occur. No such lands would be expected to remain in possession of the company after the 1st day of July, 1879. This date is at least thirteen years earlier than the time when the principal of the bonds will fall due. By that date, then, it is not possible that there shall be a default as to the principal of the bonds. The only default which can happen by that time is a default in the payment of interest. Congress in thus providing for an entry upon the granted lands, provided in effect for an entry for a default which might happen before the 1st of July, 1879, and such default can be in the matter of interest alone.

Counsel for the company derive an argument in support of their views from the language of the 5th section of the act of July 2, 1864, amendatory of the act of July 1, 1862, that only one-half of the compensation for services rendered for the Government by said company shall be required to be applied to the payment of the bonds issued by the Government in aid of the construction of said road, (13 Stat., 359.) The language of the 6th section of the act of 1862, on this subject, is, "all compensation for services rendered for the Government shall be applied to the payment of said bonds and interest until the whole amount is fully paid."

There is this difference between the original provision and the amendment, that the latter omits the words "and interest." If this omission were intentional, it shows that Congress, in passing the amending act, intended to leave in force all the provisions of the original act in relation to the re-imbursement of interest, and reduced the reservation of compensation one-half in so far only as that reservation should be applicable to the discharge of the principal of the bonds—an application which could only be required in the event that the interest should be regularly repaid by the company from other sources. If the omission was accidental, and the word "bonds" in the 5th section of the act of 1864 means the

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same as the words "bonds and interest" in the 6th section of the act of 1862, then Congress intended to reduce the specific appropriation of the compensation for services rendered for the Government from all to half.

An argument is made for the company that this specific appropriation indicates that Congress expected no re-imbursement from the general resources of the company before the maturity of the principal of the bonds, except the five per centum of the net earnings after the completion of the road, which is to be annually applied to the payment of the bonds and interest.

This argument would reach too far. The limitation of it to payments before the maturity of the principal is warranted by nothing in the statutes themselves. Fairly carried out, it would establish that neither the principal of the bonds nor the interest can ever be required from the company by the Government, except out of one-half of the compensation for services rendered to the Government, and out of the reservation of five per centum of the net earnings. If these are the only resources from which the Government can claim payment of principal and interest before the expiration of the thirty years, they are the only resources from which such payment can be claimed after the expiration of the thirty years. It is incredible that Congress intended to assume so large a liability with so small a provision for re-imbursement.

The question may be asked why the reservation of one-half of the compensation for the carrying for the Government, and the five per centum upon the net earnings, should be made at all, if Congress intended that the Government should be re-imbursed by the company from its general resources, either before or after the expiration of thirty years. Various answers might be suggested. The act of 1864 was passed in the midst of a formidable war. The intervention of foreign powers was within the range of possibility. An occasion might possibly arise for transportation of troops and munitions of war across the continent to such an extent that the Government would, for the time, absorb the whole service of the road. In such a case it would be exceedingly harsh for the Government to reserve for its own debt the whole com-

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pensation for that service, and thus leave the company without current resources for carrying on the road.

An argument against the conclusion to which my mind has come has been founded on the language of members of the House of Representatives when the act of 1862 was under consideration. In expounding an act of Congress the construction placed upon it by individual members of Congress, in the debate which took place on its passage, cannot be considered. (*Eldridge vs. Williams*, 3 How., 1; 6 Opins., 464; 9 Opins., 57.)

I am more impressed by the rejection of an offered amendment to require the payment of the current interest, (Congressional Globe, part 2, 1861-'62, p. 1911.) But this was only in one House of Congress; it was in Committee of the Whole, and after very brief debate, and the weight which fairly belongs to such a circumstance is insufficient to reverse the conclusion to which I am brought by the other considerations in the case.

It has been argued on the part of the company that an intention in Congress to require the immediate repayment of interest would have been distinctly expressed. This argument may be turned the other way with equal force. It may be said that an intention to postpone the repayment of interest would have been distinctly expressed. The addition of a few plain words would have settled the meaning, one way or the other, beyond all controversy. And strictly construing the acts, wherever obscure, against the party most benefited by them, I find in the omission of such words a strong reason for holding that Congress meant to leave in full force the equities that prescribe the immediate repayment of moneys paid for one's benefit and at his request.

My conclusion, then, is that the Government may lawfully claim from the company the amount of the interest in question, as soon as such interest is paid by the Government.

To the particular question in your letter of November 23, I answer that the Government may retain the entire amount of compensation for services rendered to it by the company, applying the same to the interest paid by the United States, unless such interest shall have been repaid by the company, and in that event one half of the compensation for such ser-

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vices may be reserved and applied to the principal of the bonds.

Very respectfully, your obedient servant,
A. T. AKERMAN.

Hon. GEORGE S. BOUTWELL,
Secretary of the Treasury.

NOTE.—By the 9th section of the act of March 3, 1871, (16 Stat., 525,) Congress directed the Secretary of the Treasury to pay over in money to the Pacific Railroad Companies mentioned in the act of July 2, 1864, and performing services for the United States, one-half of the compensation at the rate provided by law for such services theretofore or thereafter rendered. But subsequently, by the 2d section of the act of March 3, 1873, (17 Stat., 508,) the Secretary was directed "to withhold all payments to any railroad company and its assignees, on account of freights or transportation, over their respective roads, of any kind, to the amount of payments made by the United States for interest upon bonds of the United States issued to any such company, and which shall not have been re-imbursed, together with the five per cent. of net earnings due and unapplied as provided by law," &c.

INFORMERS' SHARES.

An internal-revenue officer, who has obtained information of a violation of the internal-revenue laws in the manner authorized thereby, may be awarded an informer's share of the proceeds of the fine or forfeiture. Detectives employed in the internal-revenue service under section 50 of the act of July 20, 1868, may be allowed informers' shares.

DEPARTMENT OF JUSTICE,
January 7, 1871.

SIR: I have received your letter of the 22d ultimo, calling my attention to your letter of June 7, 1870, addressed to the Hon. E. R. Hoar, Attorney-General, and asking of him a further opinion touching the rights of certain revenue officers and detectives under certain circumstances therein stated to be awarded informers' shares. It seems that your former letter, by some inadvertence, had remained unanswered.

As I understand the questions therein presented to this Department, they are as follows:

1. Can an officer of internal revenue who has obtained and given information of a violation of the internal-revenue laws, by an examination of books and premises, in the manner au-

Rent for use of Property by the Army.

thorized by section 37 of the act of June 30, 1864, section 5 of the same act as amended July 13, 1866, section 31 of the act of July 13, 1866, and section 45 of the act of July 20, 1868, be awarded an informer's share of the proceeds of the fine or forfeiture?

2. Whether detectives employed under the authority of section 50 of the act of July 20, 1868, are entitled to receive informers' shares?

Without again going over the ground covered by the opinion of Mr. Attorney-General Hoar, of May 13, 1870, and without expressing my dissent or approval of all the conclusions therein stated, I have to say that, in my opinion, both the questions now presented must be answered affirmatively.

In arriving at this conclusion it is not necessary to review any part of the argument of Mr. Attorney-General Hoar, inasmuch as this affirmative answer is entirely consistent with all the conclusions of that opinion.

Very respectfully, your obedient servant,

B. H. BRISTOW,

Solicitor-General and Acting Attorney-General.

Hon. GEO. S. BOUTWELL,

Secretary of the Treasury.

RENT FOR USE OF PROPERTY BY THE ARMY.

Claim for rent of property known as Kalorama, in the District of Columbia, occupied for military purposes during the late rebellion—being for the difference between the rate demanded and the rate already paid to claimant by the Government—held not to be valid upon the facts presented.

DEPARTMENT OF JUSTICE,

January 12, 1871.

SIR: Your letter of October 20, 1870, requests my opinion upon the legal questions arising upon the claim of Thomas R. Lovett, trustee, for rent of the property known as Kalorama, in the District of Columbia, and occupied for public uses during the late war.

On the 17th of August, 1861, General Mansfield hired the said property for the United States for \$500 per month "for the period of one year, with the privilege of keeping it at

Rent for use of Property by the Army.

least three years if desirable for all purposes." And upon these terms possession was taken on the 23d day of August, 1861.

The stipulated rent of \$500 per month was paid up to June 30, 1862. Thence up to January 31, 1865, rent was paid at the rate of \$250 per month. Thence up to September 30, 1867, the date when the premises were vacated by the United States, at the rate of \$200 per month. These several sums, amounting to \$19,295.16, were received by the claimant, Mr. Lovett. But he now demands of the United States a large balance, to wit, the monthly rent of \$500 from August, 23, 1861, to September 30, 1867, less the aforesaid amounts which he acknowledges to have been paid.

It appears that in June, 1862, Captain Camp, assistant quartermaster, recommended to the Quartermaster-General a reduction of the rent, stating at the same time that he was satisfied that the owners would protest against the reduction. The Quartermaster-General transmitted this recommendation to the Secretary of War, who approved it, and on the 25th day of June Captain Camp received notice that his request for the reduction of the rent had been granted.

The claimant received the reduced rent from time to time, and it is not shown that he objected to the reduction or protested against it, or sought possession of the property. Captain Camp being dead, the most direct evidence on the subject of the negotiations between the parties after the reduction was ordered is unattainable. But I think it may be fairly inferred from the receipt of the rents by the claimant, from the absence of evidence of a protest from him against the reduction, and from the absence of evidence that he sought possession of his property, that he accepted the reduction and agreed to a corresponding modification of the original contract. Hence I am of the opinion that his claim is invalid.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. WM. W. BELKNAP,

Secretary of War.

Case of the "Nellie Baker."

CASE OF THE "NELLIE BAKER."

It appearing in this case that in 1864 a claim for the hire of the steamer was before the Quartermaster-General, and that there was then a discussion between him and the owners as to the amount due; that he finally adjudged the amount due to be \$4,200; and that the owners, though dissatisfied, accepted this sum at the time as all that could be got upon their claim: *Held* that this action is conclusive, so far as the Departments are concerned, such settlements having the character of final judgments.

DEPARTMENT OF JUSTICE,
January 12, 1871.

SIR: I have considered the claim of the owners of the steamer "Nellie Baker," upon which my opinion is requested in your letter of December 9, 1870.

The facts shown in the accompanying papers are these: That in the year 1862 this steamer was chartered by Captain Hodges, United States Army, for one month, with a privilege for an indefinite extension of time by the Government, at the rate of \$350 per day. In February, 1863, she was sold to the Government for \$44,000, to date from January 28, 1863. There is evidence that under the charter-party the vessel was employed in the service of the United States for forty-one days. The claim of the owners for compensation for this service appears to have been the subject of a discussion between them and the Quartermaster Department, in the year 1864.

On the 16th of September, 1864, the owners wrote to their attorney at Washington as follows, "In the matter of the 'Nelly' you have our full consent to settle on the terms you can." On the 20th of October, 1864, the owners again wrote to their attorney, "Yours, covering the accounts, &c., of the Nelly, came duly to hand, and we are much obliged to you for the same, and we are glad to think the matter has progressed thus far. We took the papers to the quartermaster, who said that he was not in funds, but expected to be shortly, when he would pay up."

The Quartermaster-General, on the 17th of October, 1864, sent to Captain McKim, assistant quartermaster at Boston,

Case of the "Nellie Baker."

the following order: "The accounts of the steamer 'Nelly Baker,' for services from December 3d to December 7th, 1862, and from January 1st to January 5th, 1863, as per certificate of service and sailing orders, &c., herewith, are referred to you for payment, as follows: December 3 to December 7, 1862, four days; January 1 to January 5, 1863, inclusive, five days; nine days at \$350 per day, \$3,150, with allowance of three days at \$350 per day, time allowed to return to her port of discharge, viz, Boston or Portland, \$1,050; sum total, \$4,200, on which basis you will settle the inclosed."

In pursuance of this order, Captain McKim, at Boston, on the 20th of January, 1863, paid the owners the sum of \$4,200 in full of the above account.

The owners protested that the amount was insufficient, but forbore to appeal from the Quartermaster-General to the Secretary of War, from an opinion that such an appeal would be ineffectual.

According to the statement of the Second Comptroller of the Treasury, accompanying your letter, the facts would have authorized the allowance to the owners of \$10,150 in addition to the \$4,200 actually received.

From these facts I infer that the claim for the whole amount was, in the year 1864, before the Quartermaster-General, and that there was then a discussion between him and the owners as to the amount due; that he finally adjudged that the amount due was \$4,200; and that the owners, though dissatisfied, accepted this sum at the time as all that could be got upon their claim.

It seems to me that this action is conclusive, so far as the Departments are concerned. The account cannot now be re-opened on the ground that the Quartermaster-General then made a wrong decision, without adopting an improper and troublesome rule. Such settlements have the character of final judgments, and should not be disturbed.

That the settlement then made was intended to embrace the whole of the vessel's service under the charter-party is further apparent from the fact that it provided for three days occupied in the return of the vessel to her port of discharge. There could be no just claim for these days, except at the conclusion of the vessel's service, and hence all of the service

Naval Court-Martial.

prior to the conclusion must have been considered in the settlement.

If it appeared that the claim then submitted was only for the service for which pay was actually allowed, perhaps the settlement of it would not bar a claim for the residue of the vessel's service. But understanding that the claim then made was for the whole service, and that a part of the claim only was allowed after consideration of the whole, I think that the whole must be held an adjudicated matter.

As these views dispose of the whole case, it is unnecessary to answer in detail the specific questions put by the Comptroller.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. WILLIAM W. BELKNAP,
Secretary of War.

NAVAL COURT-MARTIAL.

Where, at the organization of a naval court-martial, each member of the court was first sworn by the judge-advocate, who was then sworn by the president of the court, instead of the oath being first administered by the president to the judge-advocate, and then by the latter to each member of the court, as prescribed by the act of July 17, 1862: *Held that, notwithstanding the irregularity in the order of administering the oaths, the proceedings of the court must now be held valid.*

DEPARTMENT OF JUSTICE,
January 20, 1871.

SIR: Your letter of the 6th instant requests my opinion upon the question, whether the proceedings of a naval general court-martial, convened on board the United States ship "Fredonia," in the Bay of Callao, Peru, South America, on the 30th day of August, 1867, by order of Rear-Admiral Dahlgren, commanding the United States squadron in the South Pacific, by which Second Assistant Engineer William Pollard was tried, are void *ab initio*.

The only ground upon which the proceedings of that court are called in question is this: that the members and judge-

Naval Court-Martial.

advocate were not respectively sworn in the order prescribed by law.

The act of April 23, 1800, (2 Stat., 50,) directs that each member of the court shall be sworn by the judge-advocate, and "this oath or affirmation being duly administered," the president of the court shall administer the oath to the judge-advocate. The act of July 17, 1862, (12 Stat., 603, 604,) reverses the order, and requires the president of the court to administer the oath to the judge-advocate, and "this oath or affirmation being duly administered," each member of the court, before proceeding to trial, shall take the proper oath, which the judge-advocate is authorized to administer.

The order pursued at the organization of the court-martial in question was that prescribed in the former act. The order which should have been pursued is that prescribed in the latter act. No objection appears to have been made at the time. The accused submitted himself to the jurisdiction of the court, and answered the charges. Its proceedings, in all other respects, appear to have been regular, and the sentence of dismission was duly executed.

I cannot think that the order in which the members of the court and the judge-advocate are respectively to be sworn is so material that a mistake in it makes the whole proceedings void, especially when no exception is taken at the time. It is not denied that the proper oaths were administered, and by the proper officers. The members and the judge-advocate were all placed under the sanction prescribed by law. The accidental inversion of the order of swearing could have no injurious effect upon the fairness of the trial. There are many sorts of exception sustainable, if taken in time, but which come too late after the completion of a trial. Such, in my judgment, is the one which is now taken to these proceedings.

I am therefore of opinion that, notwithstanding the irregularity in the order of administering the oaths, the proceedings must now be held valid.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. GEORGE M. ROBESON,

Secretary of the Navy.

Case of Moses Stern.

CASE OF MOSES STERN.

A citizen of the North German confederation, who becomes a naturalized citizen of the United States, must have an uninterrupted residence of five years in the United States before he is entitled to the immunities guaranteed by the treaty with that confederation of February 22, 1868. The recital contained in the record of the naturalization proceedings, that he had resided continuously in this country for more than five years, is not conclusive as to the fact so recited.

DEPARTMENT OF JUSTICE,
January 21, 1871.

SIR : Your communication of November 12, 1870, calls for my opinion upon the question whether Moses Stern is entitled to claim the protection of this Government against the government of North Germany, as a naturalized citizen of the United States, under the treaty concluded at Berlin on the 22d day of February, 1868.

The first article of that treaty is as follows :

“Citizens of the North German confederation, who become naturalized citizens of the United States of America, and shall have resided uninterruptedly within the United States for five years, shall be held by the North German confederation to be American citizens, and shall be treated as such.” (15 Stat., 615.)

To entitle a person to the benefit of this article, he must have been naturalized and have resided uninterruptedly within the United States for five years.

Mr. Stern has been naturalized, but he is not shown to have resided here five years without interruption. It does not appear that he was in the United States until March, 1865, when he enlisted in the Union Army, from which he was honorably discharged in May, 1865. In April, 1866, being still a minor, he was in his native country, Westphalia, with his father, and passed much of that year there. During this time he obtained a passport, as a Prussian subject, to go to Vegesack to perfect himself in the business of the preparation of cigars.

Though his residence in the United States would not be

Case of Moses Stern.

interrupted, in the meaning of the treaty, by a transient absence for business, pleasure, or other occasion, with the intention of returning, I think that the circumstances of Mr. Stern's absence in Europe, in 1866, amount to a solution of the continuity of his residence in the United States. A minor of Prussian birth, after a short residence in this country, spends nearly a year in his native country, living with his father, whose home is there, and holds himself out as a subject of that country and obtains its formal credential as such when about to go to a neighboring country to learn a trade. He does not appear to have claimed, while there, any privileges on account of an American domicile, or to have asserted any nationality, either incipient or consummate, except that of Prussia. All these things signify a Prussian character and a practical renunciation, so far as the present question is concerned, of the rights acquired by his previous residence here and his service in the Union Army. His return to America seems to have been the result of a purpose subsequently formed.

He was naturalized in the United States district court for Connecticut, on the 27th day of March, 1869. The record recites that he had resided constantly in the United States for more than five years. If this recitation were conclusive, his rights to protection under the treaty would be established. The record establishes the general fact of his naturalization and of his right to be recognized here as an American citizen in all domestic transactions.

But recitations in the record of matters of fact are binding only upon parties to the proceedings and their privies. The Government of the United States was no party, and stands in privity with no party to these proceedings. And it is not in the power of Mr. Stern, by erroneous recitations in *ex parte* proceedings, to conclude the Government as to matters of fact.

The record also recites that he had enlisted in the Army of the United States in 1865, and had been honorably discharged the same year. This fact has no bearing upon the matter in hand, because naturalization, unless accompanied by a five years' residence in the adopted country, confers no rights under the treaty.

Land-Grant to State of Kansas.

Hence I am of opinion that Mr. Stern, though regularly naturalized in the United States, not having had an uninterrupted residence of five years here, is not entitled to the immunities guaranteed by the treaty with North Germany of 1868.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. HAMILTON FISH,
Secretary of State.

LAND-GRANT TO STATE OF KANSAS.

Alternate sections of public lands, though unsurveyed, which fall within the operation of the act of March 3, 1863, entitled "An act for a grant of lands to the State of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraphs in said State," may be withdrawn from pre-emption, homestead, and other disposal, along the lines of the railroads thus aided, where the same are located through such unsurveyed lands.

DEPARTMENT OF JUSTICE,
February 4, 1871.

SIR: Your communication of the 16th ultimo requests my opinion upon the question whether the President or the Secretary of the Interior has the power to withdraw from market and reserve from sale and other disposal public lands of the United States not yet surveyed, falling within the operation of "An act for a grant of lands to the State of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraphs in said State," approved March 3, 1863, (12 Stat., 772.)

The immediate occasion of this call for an opinion from this Department is this: that one of the aided railroads, that from Atchison *via* Topeka to the western line of the State, in the direction of Fort Union and Santa Fé, New Mexico, having already filed two maps of the definite location of the road, to wit, between Atchison and Emporia, and between Emporia and Wichita, which have been accepted by the Secretary of the Interior, has now filed a map of the

Land-Grant to State of Kansas.

definite location of the road between Wichita and Ford Dodge. And you have been requested to withdraw from pre-emption, homestead, and other disposal, the lands within the limits specified by the act, on each side of the tract thus located.

If the lands were surveyed, no question would arise. But this part of the road traverses lands which are unsurveyed; and it has been considered questionable whether they are now subject to the same definite appropriation for the use of the road.

I find nothing in the act which in any way limits the donation to lands already surveyed. When Congress authorized this company to construct its road through the public lands, and gave to it alternate sections on each side, it must have been the intention that the grant should go as far and as fast as the road should go. The only difficulty is in indicating distinctly the lands which shall be thus reserved. But I think that the reservation can be made, and that the effect of it will be to give to the company a preference to purchasers and claimants by right of pre-emption or homestead, of such lands, within the prescribed limits, as, when surveyed, shall answer the description in the grant, to wit, every "alternate section of land designated by odd numbers, for ten sections in width on each side of said road." Claimants by right of pre-emption and homestead settlements must take care, if they enter upon unsurveyed lands, to select such as shall not belong to the railroad company under this reservation, when the lands to which the company's right has attached come to be defined by survey. In the language of Attorney-General Cushing, (8 Opins., 246,) such withdrawal is "the only means of preventing anticipatory private appropriations in the railroad grants."

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. COLUMBUS DELANO,

Secretary of the Interior.

Case of Lieutenant-Colonel Edir.

CASE OF LIEUTENANT-COLONEL EDIR.

Vacancies which, under section 12 of the act of July 15, 1870, were intended by Congress to be filled from officers placed on the supernumerary list in pursuance of the provisions of that section, comprised only such vacancies as should occur prior to January 1, 1871; hence a vacancy occurring on or after that date was excluded from the operation of the above-mentioned enactment.

DEPARTMENT OF JUSTICE,***February 11, 1871.***

SIR: Your letter of the 8th instant requests my opinion upon the case of John R. Edir, late lieutenant-colonel in the Army of the United States. The material facts in this case are as follows:

The act of July 15, 1870, section 12, (16 Stat., 318,) authorizes the President to "transfer officers from the regiments of cavalry, artillery, and infantry, to the list of supernumeraries." In pursuance of this authority, an order was issued on the 1st of December, 1870, transferring Lieutenant-Colonel Edir to the list of supernumeraries.

The same section further provided that "all vacancies now existing, or which may occur prior to the 1st day of January next, in the cavalry, artillery, or infantry, by reason of such transfer, or from other causes, shall be filled in due proportion by the supernumerary officers, having reference to rank, seniority, and fitness, as provided in existing law regulating promotions in the Army. And if any supernumerary officers shall remain after the 1st day of January next, they shall be honorably mustered out of the service with one year's pay and allowances."

On the 31st day of December, 1870, Colonel John D. Stevenson, of the 25th Infantry, was, at his own request, by the direction of the President, honorably discharged from the service of the United States, said discharge to take effect January 1, 1871. This discharge was in pursuance of section 3 of said act. Lieutenant-Colonel Edir insists that he was entitled to the vacancy thus created by the resignation of Colonel Stevenson. He was not so promoted to Colonel Ste-

Case of the "Joseph Pierce."

venson's place, but on the 2d of January, 1871, was honorably mustered out of the service under the provisions of said section 12.

There can be no question that on the 1st day of January Lieutenant-Colonel Edir was a supernumerary officer, and that if he then possessed the proper rank, seniority, and fitness, he would have had a valid claim to promotion to a vacancy which had occurred prior to that day. I do not think that he had any just claim to a vacancy which did not begin to exist until that day. Colonel Stevenson's resignation took effect on that day. The vacancy thereby created did not occur prior to that day, and does not belong to that class of vacancies which, under the law, were to be filled by the supernumerary officers. The vacancies which Congress intended that supernumeraries should fill were not all vacancies which might occur before their discharge, but only such vacancies as should occur before the 1st day of January, 1871.

I am, therefore, of opinion that Lieutenant-Colonel Edir was not lawfully entitled to the place made vacant by the resignation of Colonel Stevenson, and that he was lawfully mustered out of service by the order of January 2, 1871.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. Wm W. BELKNAP,

Secretary of War.

CASE OF THE "JOSEPH PIERCE."

In a steamboat claim under the 2d section of the act of March 3, 1849, and the 5th section of the act of March 3, 1863, the burden of proof rests on the claimant, and before he can become entitled to compensation for the loss of his property, he must prove everything made essential by the act—the ownership, the military service, the destruction, the unavoidable character of the accident, and the entire absence of fault or negligence on his part.

DEPARTMENT OF JUSTICE,

February 18, 1871.

SIR: In the case of the steamboat "Joseph Pierce," referred to me in your letter of the 14th instant, I find no ques-

Oregon Central Railroad Company.

tion of law but this: On which party does the burden of proof rest?

This vessel while in the military service of the Government, into which she had been impressed, was destroyed by the explosion of one of her boilers at Bank's Landing, on the Mississippi River, in July, 1865.

The act of March 3, 1849, section 2, (9 Stat., 415,) the provisions of which are extended to steamboats by the act of March 3, 1863, section 5, (12 Stat., 743,) compensates the owner for property destroyed in such service by unavoidable accident, "provided it shall appear that such * * * destruction was without any fault or negligence on the part of the owner of the property."

The burden of proof clearly rests on the owner. Before he can receive the compensation allowed by this act, he must prove everything made essential by the act, the ownership, the destruction, the military service, the unavoidable character of the accident, and the entire absence of fault or negligence on his part.

Whether in this case the explosion was caused by a defect in the boiler which would have been discovered and remedied by proper attention on the part of the owners, or by the carelessness of the engineer or other agents of the owners, are questions of fact upon which I am not required to give an opinion. (12 Opins., 206.)

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. GEORGE S. BOUTWELL,

Secretary of the Treasury.

OREGON CENTRAL RAILROAD COMPANY.

The grants made by the act of May 4, 1870, to the Oregon Central Railroad Company cannot be transferred by that company to another company; the above-named company being alone within the contemplation of Congress, in respect of the donations made and duties imposed by that act.

DEPARTMENT OF JUSTICE,

February 20, 1871.

SIR: On the 19th of October last, Mr. Cox, then Secretary

Oregon Central Railroad Company.

of the Interior, addressed to me a letter requesting my opinion upon certain questions growing out of the act granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the State of Oregon, of May 4, 1870. (16 Stat., 94.)

That act grants the right of way and alternate sections of the public lands to the amount of ten alternate sections per mile on each side of the road, to the Oregon Central Railroad Company, and to their successors and assigns. On the 15th of August last, that company, in pursuance of a resolution of its board of directors, executed an instrument purporting to assign to the Willamette Valley Railway Company all the right, title, interest, and claim, vested and contingent, which the said Oregon Central Railroad Company possessed or was entitled to have in and to all and singular the franchises, benefits, privileges, grants, and lands made or expressed in said act of Congress.

My opinion is asked upon the question whether the grants made in said act to the Oregon Central Railroad Company, its successors and assigns, are susceptible of being transferred by it to another company, so that the latter will be entitled to exercise the franchises and to enjoy the benefits conferred by said act.

There is nothing in any part of the act, except the 1st section, from which even a suspicion could arise that Congress intended a dealing with any company but the Oregon Central Railroad Company. The 2d section provides that whenever and as often as the said company shall file with the Secretary of the Interior maps of the survey and location of twenty or more miles of said road, the Secretary of the Interior shall cause the said granted lands to be segregated from the public lands, &c. The 3d section provides that whenever and as often as the said company shall complete and equip twenty or more consecutive miles of the railroad or telegraph line, the Secretary of the Interior shall cause the same to be examined at the expense of the company by three commissioners appointed by him, and if they shall report that such completed section is a first-class railroad and telegraph line, properly equipped and ready for use, he shall cause patents to be issued to the company for so much of the

Oregon Central Railroad Company.

said granted lands as shall be adjacent to and coterminous with the completed sections. The 4th section provides that the granted lands, with certain exceptions, shall be sold by the company only to actual settlers, &c. The 5th section provides that the said company shall, by mortgage or deed of trust to two or more trustees, appropriate and set apart all the net proceeds of the sales of said granted lands, as a sinking fund, to be kept invested in the bonds of the United States, or other safe and more productive securities, for the purchase from time to time, and the redemption at maturity, of the first-mortgage construction bonds of the company, &c.; and each of said first-mortgage bonds shall bear the certificate of the trustees, setting forth the manner in which the same is secured and its payment provided for; and the district court of the United States is to have jurisdiction to enforce the provisions of this section. The 6th section provides that said company shall file with the Secretary of the Interior its assent to the act within a year from its passage; and the grant is upon condition that said company shall complete a section of twenty or more miles of the road within two years, and the entire road within six years from the same date.

Thus it appears that in every one of these sections, there is a provision for some act to be done or some benefit to be received by the company. The *said company* is to file maps in the Interior Department. The *said company* is to complete and equip the road and telegraph line in sections of twenty miles each. *The company* is to pay the expense of an examination by commissioners. Patents are to be issued to *the company*. The granted lands, except such as shall be reserved for stations, &c., are to be sold by *the company* to certain classes of persons, in limited quantities, and at a limited price. *The said company* is to execute a mortgage or deed of trust to trustees, of the net proceeds of the sales of lands, in order to secure the first-mortgage construction bonds of *the company*. *The said company* is to file with the Secretary of the Interior its assent to the act within a specified time. And the grant is upon condition that the *said company* shall complete twenty miles of the road within two years, and the entire road in six years.

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Congress does not say in these sections that any successor to the interests of the company, by contract or otherwise, shall have the rights and perform the conditions granted and required in these sections. I can see very good reasons why Congress should look to this company only. The corporators or officers may have been persons in whom Congress had special confidence. The provisions of its charter may have been such as were acceptable to Congress. There is no certainty that any individual or body corporate which should purchase the supposed rights of the Oregon Central Railroad Company would equally possess the confidence of Congress.

In the 5th section it is required that said company shall perform certain important acts; and jurisdiction is given to the courts to enforce this requirement. In the event that this company should disappear, and that another company claiming a succession to it by contract should present itself, a serious question might arise whether the coercive power given to the courts in the 6th section could operate upon any other company but the one specifically named in the section. However that question might be decided, and whatever strength there might be in the argument that the company which succeeded to the rights of the Oregon Central Railroad Company would also succeed to its liabilities, Congress would hardly expose the Government to the possible annoyance of such a litigation without explicitly saying so.

It is noticeable that there are no stipulations in the papers transmitted to me showing the engagements between the two companies which bind the Willamette Valley Railway Company to execute the mortgage, issue the bonds, or do the other acts required in the 5th section. All that Mr. Holliday, acting for the purchasing company, agrees to do, is to build the railroad and telegraph line as proposed in said act of Congress, and to pay to the other company the sum of one dollar.

If the Oregon Central Railroad Company can lawfully transfer its rights under the act to one company, its grantee could transfer to a succeeding company, and so on indefinitely; and the Interior Department, before issuing patents for the lands, would be subjected to the burden of examining successive conveyances and making sure of their validity. More-

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over, the company in that case could assign its grants for a portion of the road to one company, and for another portion to another, and so on. And thus the Government, instead of dealing with one responsible company selected by Congress, might be obliged to deal with various companies not selected by any public authority.

The whole strength of the argument which has been made to me in favor of the legality of the transfer, rests upon the words in the 1st section of the act, "to their successors and assigns." It is asked of what use is the word "successor," unless other parties may succeed to the Oregon Central Railroad Company in all the rights conferred by the act? If this word were new in conveyances, the argument founded upon it would perhaps be irresistible. But for centuries the word *successors* has been in common use in grants to aggregate corporations, and it has been invariably held to be a word of limitation merely, like the word *heirs* in a conveyance to individuals. "The successors of a corporation correspond to the heirs of a natural person." (Burrill's Law Dictionary, title, "Successors.") "Where a fee is intended to be conveyed to a corporation, sole or aggregate, the word successors corresponds as equivalent to heirs in regard to natural persons." (Wooddeson's Lectures, vol. 2, pp. 165-6. See also Angell & Ames on Corporations, s. 172; 2 Kernan's N. Y. Reports, 127.)

This word is indeed unnecessary to convey a fee in a grant to an aggregate corporation, because the corporation itself being immortal, the word succession is superfluous. Nevertheless, it has commonly been inserted in such grants, having probably been at first accidentally adopted from grants to corporations sole, where it was necessary to convey a fee, and its meaning is well settled. I find nothing in the context of this congressional grant to show that the word is used here in a new or peculiar sense.

I have not entered into the general question of the right of a corporation to transfer its franchises without special authority from the legislature. I have merely inquired, to what company has Congress made its donation, and on what company did Congress impose duties by the act of May 4, 1870? And I can find no company to have been within the con-

Western Pacific Railroad Company.

temptation of the legislative body except the Oregon Central Railroad Company.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. COLUMBUS DELANO,

Secretary of the Interior.

—
WESTERN PACIFIC RAILROAD COMPANY.

A decision made by a former head of Department, after having heard the parties in interest, and after careful and thorough consideration of the case—there being no allegation that any material fact can be shown which was not before him—should be regarded by his successor as final, and be left undisturbed.

The pendency before the proper tribunals of a private land-claim in California, under the act of March 3, 1851, brings the land covered by the claim within the meaning of the term "reserved" in section 3 of the act of July 1, 1862, though the claim is ultimately decided to be invalid; and consequently such land is excepted from the grant contained in the latter act.

DEPARTMENT OF JUSTICE,

March 7, 1871.

SIR: On the 7th of July last, Mr. Cox, then Secretary of the Interior, decided the case of *K. C. Sargent and others, and S. V. Treadway and others vs. The Western Pacific Railroad Company*, in which an appeal to him had been taken from the Commissioner of the General Land-Office.

He affirmed the decision of the Commissioner in favor of the Sargeants and Treadways, and recognized those persons as the lawful purchasers of certain lands in California under the act of July 23, 1866, (14 Stat., 220.)

The railroad company has asked you to reconsider the case, and to reverse this decision of your predecessor. The application rests solely upon the ground that his decision was erroneous in law. Your letter of the 6th of January last requests my advice upon the question, whether you are authorized to reconsider the case, and also upon the question whether there is any error of law in Mr. Cox's decision.

It has not been settled how far the decisions of the head of

Western Pacific Railroad Company.

a Department have the conclusive force of the judgments of courts. But the better opinion certainly is that such decisions should not be disturbed except in extraordinary cases. (*The United States vs. The Bank of The Metropolis*, 15 Peters' R., 401; Opinion of Mr. Wirt, 2 Opins., 9; of Mr. Taney, 2 Opins., 464; of Mr. Nelson, 4 Opins., 341; of Mr. Toucey, 5 Opins., 29; of Mr. Johnson, 5 Opins., 123-4; of Mr. Black, 9 Opins., 101, 301-2, 387; of Mr. Stanbery, 12 Opins., 358; of Mr. Hoar, dated April 26, 1869, in relation to the case of Admiral Goldsborough, ante p. 33; and another opinion of May 5, 1870, in relation to the claim of George Chorpenning, ante, p. 226.) Against this current of authority is to be set the opinion of Attorney-General Bates, (10 Opins., 61-62.) This dissent is, however, somewhat weakened in force by his later opinion in the case of Anson Dart, (10 Opins., 255;) in which he seems substantially to concur with the other opinions which I have cited.

In the case in hand, the parties in interest were heard before Secretary Cox. His decision was the result of careful and thorough consideration. It is not alleged that any material fact in the case can now be laid before you which was not before him. There was no haste, no surprise, no inadvertence. I am therefore of opinion that his decision should be considered as the final adjudication of your Department.

But you also ask whether his decision was correct.

The claim of the railroad company rests upon the donation in the act of July 1, 1862, sec. 3, (12 Stat., 492,) "of five alternate sections per mile, on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed." This section is amended by the act of July 2, 1864, sec. 4, (13 Stat., 358.)

The lands in question are a part of what is known as the "Moquelemos" grant. This grant was confirmed by a decree of the district court in California in April, 1857. In March, 1860, the Supreme Court on appeal reversed this decision, and remanded the case for further evidence. The district court

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upon a new hearing, in June, 1872, rejected the claim, and this decision was affirmed by the Supreme Court on appeal, February 13, 1865.

The Sargeants and Treadways contend that the pendency of this claim brings the land in question within the meaning of the term "reserved" in section 3 of the act of July 1, 1862, and thus excepts it from the donation to the company. On the other hand the company contends that the pendency of such a claim ultimately ascertained by the decision of the Supreme Court to have been invalid, does not bring the land within the meaning of that term.

To ascertain the meaning of Congress in the use of this word "reserved," we may resort to other legislation in which the same term occurs. An act was passed March 3, 1851, to ascertain and settle the private land-claims in the State of California, in which the mode of proceeding to settle such claims is prescribed in full. (9 Stat., 631.) It was under this act that the above proceedings in relation to the Moquelemos grant were had.

In an act to extend pre-emption rights to certain lands therein mentioned, passed March 3, 1853, (10 Stat., 244,) this language is found: "That any settler who has settled or may hereafter settle on lands heretofore reserved on account of claims under French, Spanish, or other grants which have been or shall be hereafter declared by the Supreme Court of the United States to be invalid, shall be entitled to all the rights of pre-emption granted by this act and the act of 4th of September, 1841, entitled 'An act to appropriate the proceeds of the public lands, and to grant pre-emption rights,' after the lands shall have been released from reservation, in the same manner as if no reservation existed."

In this act Congress treats lands in the condition of the "Moquelemos" grant as lands reserved. There, then, we have a legislative definition of this word as used in the act of July 1, 1862. The land covered by the "Moquelemos" grant was held back from survey, on account of a claim under a Spanish grant which has been declared by the Supreme Court of the United States to be invalid, and such land in the act of March 3, 1853, is described as reserved. A word should be taken in the same sense when used in different statutes

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upon the same subject, unless there is something in the context to denote a different sense.

The case of *Wolcott vs. The Des Moines Company*, (5 Wallace, 681,) cited by Secretary Cox, seems to me to be an authority in support of his decision. The substance of that case is this: that in a grant of lands to certain railroads, an exception of lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any objects of internal improvement or for any purpose whatsoever, was applicable to lands which had been supposed to pass under a previous grant, but which were afterward determined by adjudication not to have so passed. I am unable to find a distinction between the principle of that decision of the Supreme Court and the principle upon which Secretary Cox has proceeded in his decision.

If, therefore, I were called upon to decide the question as an original one, I should come to the conclusion which he has reached.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. C. DELANO,

Secretary of the Interior.

MAIL-CONTRACTORS.

The act of February 15, 1871, prescribing an oath of office to be taken by persons who participated in the late rebellion, was intended to relieve those to whom it relates from the necessity of taking the oath required by the act of July 2, 1862, and in lieu thereof to require the modified oath prescribed by the act of July 11, 1868.

The provisions of the act of July 2, 1862, having been taken by Congress to include mail-contractors, they are to be regarded as also included in the provisions of the act of February 15, 1871.

Accordingly, mail-contractors who participated in the late rebellion, but are not disqualified from holding office by the fourteenth amendment of the Constitution, and who engage in the service of carrying the mail since the date of the act of February 15, 1871, should take the oath prescribed by the act of July 11, 1868.

DEPARTMENT OF JUSTICE,

March 9, 1871.

SIR: Your letter of the 4th instant requests my opinion

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upon the question, whether the act of Congress passed during the late session, (act of February 15, 1871,) entitled "An act prescribing an oath of office to be taken by persons who participated in the late rebellion, but who are not disqualified from holding office by the fourteenth amendment of the Constitution of the United States," (16 Stat., 412,) is applicable to mail-contractors and carriers. That act was intended to relieve the persons to whom it relates from the necessity of taking the oath required by the act of July 2, 1862, commonly known as the *test-oath*, (12 Stat., 502,) and in lieu thereof to require the modified oath prescribed by the act of July 11, 1868. (15 Stat., 85.)

The question which you now raise grows out of the words in the statute of 1871, which seem to confine the relief afforded by that act to persons who shall be elected or appointed to any office of honor or trust under the Government of the United States. Do mail-contractors and carriers fall within that description? If those persons were held to be officers when disabilities were imposed upon officers, they should also be held to be officers when relief from those disabilities is bestowed upon officers.

The act of July 2, 1862, imposes the test-oath upon persons "elected or appointed to any office of honor or profit under the Government of the United States, either in the civil, military, or naval departments of the public service, excepting the President of the United States," and requires that the oath shall be taken "before entering upon the duties of such office, and before being entitled to any of the salary or other emoluments thereof." Your letter informs me that Postmaster-General Blair considered this act as applicable to mail-contractors and carriers.

The act of March 3, 1863, entitled "An act to amend the laws relating to the Post-Office Department," (12 Stat., 701,) sanctions the construction thus given by Mr. Blair, by the following provision of section 2: "That the Postmaster-General, all postmasters and special agents, and all persons employed in the General Post-Office, or in the care, custody, or conveyance of the mail, hereafter appointed or employed, shall previous to entering upon the duties assigned to them, or the execution of their trusts, and before they shall be

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entitled to receive any emoluments therefor, in addition to the oath of office prescribed by the act of July 2, 1862, respectively take and subscribe the following oath or affirmation before some magistrate, and cause a certificate thereof to be filed in the General Post-Office," &c.

It will be perceived that this section in its recognition of the lawful application of the act of July 2, 1862, to all persons employed in the General Post-Office, or in the care, custody, or conveyance of the mail, refers to the test-oath as the *oath of office*.

The word *office* must be taken in the very broadest sense when it is made to embrace such persons as mail contractors and carriers. But having been taken in that sense both by Congress and the Postmaster-General in the imposition of disabilities, it should be taken in the same sense in the granting of relief. This construction is confirmed by the improbability that Congress would require of persons engaged in so humble a service as the carrying of mails, a test of attachment to the Government more stringent than that which is required of those in higher departments of the public service.

I am of opinion, therefore, that the test-oath should not be required of mail contractors and carriers who participated in the late rebellion, but are not disqualified from holding office by the fourteenth amendment of the Constitution of the United States, but that they should take the oath prescribed in the act of July 11, 1868.

This opinion is not applicable to the case of mail contractors and carriers who engaged in the service before the passage of the act of February, 1871, for the provisions of that act relate only to persons thereafter entering the public service.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. J. A. J. CRESWELL,

Postmaster-General.

Claim of Henry S. Bulkley.

CLAIM OF HENRY S. BULKLEY.

Claimant contracted to transport military supplies, for which service, by the terms of his contract, he was to be paid "according to the actual distance traveled from the place of departure to that of delivery, the distance to be indorsed on the bill of lading by the officer or agent receiving the supplies." Having performed his part of the agreement, claimant received payment according to the distances indorsed on the bills of lading by the proper officer, which were the reputed distances at the date of the contract. From surveys afterward made, it appeared that the actual distances exceeded those indorsed as aforesaid, and claimant asks to be paid for the difference: *Held* that, there being no evidence that either party had in view, when the contract was entered into, any distances other than those which were then currently accepted, the claim is not well founded.

DEPARTMENT OF JUSTICE,

March 20, 1871.

SIR: The claim of Henry S. Bulkley, upon which my opinion is asked in your letter of the 15th instant, is founded on a contract made on the 21st of March, 1865, between Mr. Bulkley and Colonel Potter, a quartermaster representing the United States, for the transportation of military stores from April to September, 1865, from Forts Leavenworth, Riley, Laramie, &c., to certain posts and places in Colorado, Utah, &c., at \$2.26 per hundred pounds per hundred miles.

In the 8th article of the contract is found this clause: "Transportation to be paid in all cases according to the actual distance traveled from the place of departure to that of delivery, the distance to be indorsed on the bill of lading by the officer or agent receiving the supplies."

The contractor on his part performed the agreement, and has received payment according to the distances indorsed on the bills of lading by the officers or agents receiving the supplies. He claims more, alleging that the actual distances traveled from the place of departure to that of delivery were greater than the distances thus indorsed.

It appears that the indorsed distances were those which at the date of the contract, and for several years before, had been officially recognized and adopted by the Quartermaster's Department as the basis of computation in the payment of

Claim of Henry S. Bulkley.

freight and transportation of military stores, and that these distances were well known to the contractor as the reputed distances at the time he made the contract. It also appears that surveys ordered by the military officer in command of the Department of the Missouri have since ascertained that the actual distances were greater, and the present claim is for the difference.

If the clause above quoted from the 8th article of the contract ended with the word "delivery," the most obvious construction of it when considered separately would favor this claim. But the further stipulation "the distances to be indorsed on the bill of lading by the officer or agent receiving the supplies" is useless unless it means that compensation shall be made for the distances so indorsed. The parties stipulate for payment according to the actual distances, and they also stipulate how those distances shall be determined; and in the absence of fraud or any other ground of impeachment, the decision of the designated officers or agents binds all parties.

The 8th article provides for a board of survey to be called without delay upon the arrival of the stores at the place of delivery to examine their quantity and condition; and the 7th article requires the officer or agent at that place to indorse the bill of lading in accordance with the finding of the board, "upon which indorsement payment shall be made as per contract." These and other provisions in the contract show that the indorsements were to establish the facts which should enter into the computation of the amount due.

The words "actual distance traveled" may have been used to prevent a claim for freight upon all the lading for the whole distance between the terminal points of a trip when some of the lading had been delivered at intermediate places.

It is difficult to believe that the contracting parties expected these officers and agents to indorse upon the bills of lading any but the reputed distances between the points of departure and delivery. These distances were officially recognized by the Quartermaster's Department, and were therefore known to the officers and agents who were to receive the transported property. The contract contains no provision for measurement, and no evidence that a measure-

Delivery of Letters.

ment was in the contemplation of either party, or that either party had in view any distances but those which were then currently accepted.

I am of the opinion, therefore, that the claim of Mr. Bulkley is not well founded.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. GEORGE S. BOUTWELL,

Secretary of the Treasury.

DELIVERY OF LETTERS.

Where letters addressed to a business firm which had ceased to exist, having reached their destination through the mail, were claimed by different parties, and some of the claimants, in order to ascertain their right in the premises, subsequently instituted a suit against the others in the local court, and obtained an order from the court enjoining the postmaster from delivering the letters in accordance with previous instructions of the Postmaster-General: Advised that the postmaster be directed to respect the order of the court by retaining the letters, and to deliver them to the parties who shall be finally determined by the court to be legally entitled thereto.

DEPARTMENT OF JUSTICE,

March 25, 1871.

SIR: Your letter of the 7th instant requests my opinion upon certain legal questions growing out of a controversy between parties in Mount Vernon, Ohio, concerning the ownership of letters in the post-office at that place.

Letters addressed to business firms not now in existence are claimed by different persons who once composed such firms. The Postmaster-General has given to the postmaster at Mount Vernon directions upon the subject, which are not satisfactory to some of the contending parties. These parties have made the matter the subject of appeal to a State court, and have procured from the court of common pleas an order enjoining the postmaster from delivering the letters in accordance with the instructions of the Postmaster-General.

If the State courts should attempt by injunction to impede the regular operations of the Post-Office Department in such a way as to work public detriment or inconvenience, I should advise the use of all lawful means of resistance. The Gov-

Delivery of Letters.

ernment could not be carried on successfully if liable to such obstructions.

But this case is not of that character. No attempt is made to prevent the Post-Office Department from receiving the letters in question and conveying them to their destination. Having reached their destination, there is difficulty in ascertaining to whom they are to be delivered. This difficulty is caused by a change in the names of business firms, and in the relations of parties who have composed those firms.

Certain parties say that letters addressed to the firm of C. and J. Cooper & Company belong to themselves, and an adverse claim is set up by other parties. The real controversy is, which of the two sets of claimants is the legal successor to the firm so named. I see no objection to a settlement of the controversy by a litigation in the courts of the State.

The effect of the injunction is merely to retain the letters in the custody of the postmaster until the ownership shall thus be settled by the proper tribunal. The case of *Teal vs. Felton* (12 Howard's Reports, 292,) decides that a postmaster is suable in a State court for refusing to deliver mail-matter to the person to whom it is addressed. The principle of this decision appears to authorize the present suit against the postmaster at Mount Vernon. I take it for granted that the suit in which the injunction has been issued is between the rival claimants of the letters, and the postmaster is a party only in the character of a stakeholder.

I advise, therefore, that the postmaster be directed to retain the letters, and to deliver them to the parties who shall be finally ascertained by the court to be legally entitled to them.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. J. A. J. CRESWELL,
Postmaster-General.

Citizenship.—Passports.

CITIZENSHIP.—PASSPORTS.

All persons who were citizens of Texas at the date of annexation, viz., December 29, 1845, became citizens of the United States by virtue of the collective naturalization effected by that act.

Citizens of Texas, thus adopted into the citizenship of the United States, classified and described.

Persons born abroad, who seek passports as citizens of the United States, founded on an alleged Texan citizenship at the time of annexation, may be deemed citizens of the United States and entitled to passports as such, should they be found to belong to any of the classes of Texas citizens here described.

DEPARTMENT OF JUSTICE,

March 28, 1871.

SIR: To the question in your letter of the 25th instant I answer that all persons who were citizens of Texas at the date of annexation, December 29, 1845, (9 Stat., 108,) became citizens of the United States by virtue of the collective naturalization effected by that act, (2 Martin's La. Rep., 185; 3 Martin's La. Rep., 733; Wheaton's International Law, by Lawrence, p. 897.)

The citizens of Texas thus adopted into the citizenship of the United States were of three classes.

1. Persons who came within the following description in section 10 of the general provisions of the constitution of the republic of Texas: "All persons (Africans, the descendants of Africans, and Indians excepted,) who were residing in Texas on the day of the declaration of independence, shall be considered citizens of the republic, and entitled to all the privileges of such;" and who did not forfeit their citizenship by the acts defined in the 8th section of said provisions, which is in the words following: "All persons who shall leave the country for the purpose of evading a participation in the present struggle, or who shall refuse to participate in it, or shall give aid or assistance to the present enemy, shall forfeit all rights of citizenship and such lands as they may hold in the republic."

The date of the declaration of independence was March 2, 1836.

The struggle referred to in the 8th section was the war between Texas and Mexico, for Texan independence.

Transportation of the Mails.

2. Persons born in that republic during its independence, that is, between the dates of March 2, 1836, and December 29, 1845.

3. Persons naturalized in the republic of Texas.

The provision for naturalization in that republic was in section 6 of the general provisions of the constitution and in the words following: "All free white persons who shall emigrate to this republic and who shall after a residence of six months make oath before some competent authority that he intends to reside permanently in the same, and shall swear to support this constitution, and that he will bear true allegiance to the republic of Texas, shall be entitled to all the privileges of citizenship."

If the persons born abroad, who now seek passports as citizens of the United States, founded on an alleged citizenship in Texas at the time of annexation, belong either to the first or to the third of the above classes, they are citizens of the United States, and are entitled to passports as such.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. HAMILTON FISH,

Secretary of State.

TRANSPORTATION OF THE MAILS.

The joint resolution of March 2, 1867, prohibiting the payment of claims in favor of parties who promoted, encouraged, or sustained the rebellion, &c., which accrued prior to the 13th of April, 1861, does not apply to claims in favor of corporations aggregate.

Hence the claim of a railroad corporation in one of the Southern States, for transportation of the mails from April 1 to May 31, 1861, is not in any part within the prohibition.

But unless there remains an unexpended balance not covered into the Treasury, sufficient in amount for the purpose, of moneys appropriated for the postal service for the fiscal year 1860-'61, it would seem that payment of such claim cannot now be made without a special appropriation therefor.

DEPARTMENT OF JUSTICE,

March 29, 1871.

SIR : I have considered the claim of the Wilmington and Manchester Railroad Company, which is the subject of your

Transportation of the Mails.

letter of January 30, 1871. This claim is for transportation of the mails from April 1 to May 31, 1861. That the service was rendered, and that the compensation demanded is according to the contract, seem to be unquestioned.

An objection to the payment of the claim is founded on the joint resolution of March 2, 1867, prohibiting payment by any officer of the Government of claims in favor "of any person who promoted, encouraged, or in any manner sustained the late rebellion, or in favor of any person who, during said rebellion, was not known to be opposed thereto, and distinctly in favor of its suppression." (14 Stat., 571.)

This prohibition applies to all claims which accrued or existed prior to the 13th day of April, 1861. It is contended on the part of the company that the prohibition applies only to claims in favor of natural persons, and not to claims in favor of corporations.

The language of the resolution clearly authorizes the construction for which the railroad company contends. To promote, to encourage, to sustain, and to oppose a rebellion, are all personal acts, the product of an individual will, and not acts which an aggregate corporation like the Wilmington and Manchester Railroad Company is able to do. To be distinctly in favor of the suppression of a rebellion is a personal disposition, which an individual can, and an aggregate corporation cannot, possess.

The resolution further provides that no pardon heretofore granted or hereafter to be granted, shall authorize the payment of such account, claim, or demand.

A pardon can be granted to a natural person. A corporation is not the subject of a criminal prosecution for such offenses as rebellion. By denying to a pardon the effect of authorizing payment, the resolution impliedly limits its prohibitions to payments to natural persons. This reasoning may have the effect of allowing persons to receive as stockholders a compensation which the resolution would have withheld from them if the services had been performed by them as individuals. Such discrimination is perhaps at variance with the real purpose of Congress. But the purpose expressed in the resolution, ascertained by the rules of construction, does not go beyond the case of individuals.

Claims from the Insurrectionary States.

And it is not impossible that Congress designedly spared corporations, for the sake of the loyal stockholders in the companies in insurgent States.

In another view, the greater part of this claim is out of the operation of that resolution. The resolution applies only to claims that accrued or existed prior to April 13, 1861. This claim is for mail services rendered between the 1st day of April and the 31st day of May in that year. Three-fourths of this service were rendered after the day named in the resolution.

I am therefore of the opinion that the claim in this case is exempt from the operation of the joint resolution of March 2, 1867.

You also inquire whether, in view of the provisions of the 5th and 6th and 7th sections of the legislative, executive, and judicial appropriation act of July 12, 1870, (16 Stat., 251) it would be lawful to pay such claim without a special appropriation for that purpose.

I am unable to answer this question with desirable distinctness, for want of information in relation to the funds now under the control of your Department.

If you have a balance of moneys appropriated for the fiscal years 1860-1861, not covered into the Treasury in pursuance of section 6 of said act, I am of the opinion that you may properly apply such funds to the payment of this claim. But I know of no other appropriation from which a claim can now be paid.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. J. A. J. CRESWELL,

Postmaster-General.

CLAIMS FROM THE INSURRECTIONARY STATES.

The act of March 3, 1871, providing for a board of commissioners to receive, examine, and report to Congress, upon claims of loyal citizens of the insurrectionary States for supplies taken or furnished for the use of the Army during the rebellion, repeals the act of July 4, 1864, and the joint resolutions of June 18 and July 28, 1866, so far as Tennessee and the counties of Berkeley and Jefferson, West Virginia, are concerned, and places that State and those counties upon the same footing in respect to claims as other insurrectionary States.

Claims from the Insurrectionary States.

None of these acts, however, are applicable to, or forbid the settlement by the Executive Departments of, accounts founded upon express contracts for the purchase of such supplies, made by officers or agents of the Government acting under competent authority.

DEPARTMENT OF JUSTICE,

April 6, 1871.

SIR : I have received your letter of the 21st ultimo, requesting my opinion upon certain questions arising under the act making appropriations for the support of the Army for the year ending June 30, 1872, and for other purposes, approved March 3, 1871.

The 2d section of that act provides for the appointment of a board of commissioners, "whose duties it shall be to receive, examine, and consider the justice and validity of such claims as shall be brought before them of those citizens who remained loyal adherents to the cause and the Government of the United States during the war, for stores or supplies taken or furnished during the rebellion for the use of the Army of the United States in States proclaimed as in insurrection against the United States, including the use or loss of vessels or boats while employed in the military service of the United States. * * * * * And upon satisfactory evidence of the justice and validity of any claim, the commissioners shall report their opinion in writing in each case, and shall certify the nature, amount, and value of the property taken, furnished, or used as aforesaid."

The 4th section is in these words : "That said commissioners shall make report of their proceedings, and of each claim considered by them, at the commencement of each session of Congress, to the Speaker of the House of Representatives, who shall lay the same before Congress for consideration ; and all claims within this act and not presented to said board shall be barred, and shall not be entertained by any Department of the Government without further authority of Congress."

On the 16th day of August, in the year 1861, President Lincoln issued a proclamation declaring the inhabitants of the States of South Carolina, Virginia, Georgia, North Carolina, Tennessee, Alabama, Louisiana, Texas, Arkansas, Mississippi, and Florida, ("except the inhabitants of that part

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of the State of Virginia lying west of the Alleghany Mountains, and of such other parts of that State and the other States hereinbefore named as may maintain a loyal adhesion to the Union and the Constitution, or may be, from time to time, occupied and controlled by forces of the United States engaged in the dispersion of said insurgents,") to be in a state of insurrection against the United States, (12 Stat., 1262.)

The act of June 7, 1862, section 2, directs, "That on or before the 1st day of July next, the President by his proclamation shall declare in what States and parts of States said insurrection exists." In accordance with this act, President Lincoln, on the 1st day of July, 1862, issued his proclamation declaring that the States of South Carolina, Florida, Georgia, Alabama, Louisiana, Texas, Mississippi, Arkansas, Tennessee, North Carolina, and the State of Virginia, except thirty-nine named counties, all in what was then the western part of that State, were in insurrection and rebellion, (12 Stat., 1266.) The counties of Berkeley and Jefferson are not among the counties so named.

The act of July 4, 1864, provided, "That all claims of loyal citizens in States not in rebellion," for quartermaster's stores and subsistence actually furnished to the Army of the United States, and received for by the proper officer receiving the same, or which might have been taken by such officers without giving such receipt, should be submitted to the Quartermaster-General of the United States, or the Commissary-General of Subsistence, (as the case might be,) accompanied with the proofs presented by the claimant; and these officers were required to cause each claim to be examined, and if convinced that it was just, and of the loyalty of the claimant, and that the stores had been actually received or taken for the use of and used by the Army, then to report each case to the Third Auditor of the Treasury, with a recommendation for settlement. (13 Stat., 381, 382.)

The joint resolution of June 18, 1866, extends the provisions of this act to the counties of Berkeley and Jefferson, which had become part of the State of West Virginia, (14 Stat., 360.) The joint resolution of July 28, 1866, extends the provisions of the same act to loyal citizens of the State of Tennessee, (14 Stat., 370.)

Claims from the Insurrectionary States.

The act of February 21, 1867, declares that the act above cited, of July 4, 1864, "shall not be construed to authorize the settlement of any claim for supplies or stores taken or furnished for the use of, or used by, the armies of the United States, nor for the occupation of, or injury to, real estate, nor for the consumption, appropriation, or destruction of, or damage to personal property, by the military authorities or troops of the United States, where such claim originated during the war for the suppression of the southern rebellion in a State, or part of a State, declared in insurrection by the proclamation of the President of the United States, dated July first, eighteen hundred and sixty-two, or in a State which, by an ordinance of secession, attempted to withdraw from the United States Government: *Provided*, That nothing herein contained shall repeal or modify the effect of any act or joint resolution extending the provisions of the said act of July 4, 1864, to the loyal citizens of the State of Tennessee, or of the State of West Virginia, or any county therein." (14 Stat., 397.)

Your first question is this: "Does the act of March 3, 1871, repeal, displace, or supersede, so far as the State of Tennessee and the counties of Berkeley and Jefferson, in West Virginia, are concerned, the acts of July 4, 1864, and February 21, 1867, and the joint resolutions of June 18 and July 28, 1866?"

If there had been no previous legislation on the subject of claims arising in Tennessee, and the counties of Berkeley and Jefferson, in West Virginia, the act of March 3, 1871, would undoubtedly have been construed to embrace such claims. It sends to the board such claims, of the defined classes, as originated in States (including, by fair construction, parts of States) proclaimed in insurrection. Tennessee, and the part of Virginia then embracing said counties, were so proclaimed.

But the act contains no express words of repeal. And are its provisions so repugnant to the prior legislation in relation to that State and those counties as to work a repeal by implication? Repeal by implication is not favored; and a later act does not repeal a prior act by implication, unless there is a positive repugnancy between the two. (Dwarris on Statutes, p. 533; *Dr. Foster's Case*, Rep. Pt. II, p. 62-4; *Wood vs.*

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The United States, 16 Pet. Rep., p. 342; Bowen vs. Lease, 5 Hill's Rep., p. 321.)

The act of July 4, 1864, as extended by the resolutions of June and July, 1866, provided for settling, in the Departments, claims of the defined classes arising in said State and counties. The act of March 3, 1871, provides that all claims considered by the board shall be reported to the Speaker of the House for submission to Congress—a provision which would be nugatory if the claims might, meanwhile, be settled elsewhere. It shuts out from any Department all claims within the act which, but for this prohibition, some Department would entertain.

What claims can these be, except claims from Tennessee and the said counties? Claims from the loyal States are not within the act. Claims of the classes in question from the disloyal States, except from Tennessee and said counties, are never entertained by any Department. Hence these words of exclusion can have no operation except upon claims from said State and counties.

Here, then, is found the repugnancy between the act of March 3, 1871, and the prior legislation in relation to Tennessee and said counties, which the rule requires in order to work a repeal by implication.

An additional argument in support of the same construction is derivable from the act of February 21, 1867, above quoted. In that act Congress placed a restricted construction upon the act of July 4, 1864, and having used general language, which would extend this restriction to Tennessee and the counties in question, took care to reserve said State and counties from the operation of this general language, by special provision. In passing the act of March 3, 1871, Congress must have had in mind all the legislation upon the general subject, and the omission to make in favor of that State and those counties the exception which was made in the act of 1867, signifies that such exception was not intended.

I am, therefore, of opinion that the act of March 3, 1871, repeals the act of July 4, 1864, and the joint resolutions of June 18 and July 28, 1866, so far as Tennessee and said counties are concerned, and places that State and those counties upon the same footing in respect to their claims as other insurrectionary States.

Claims from the Insurrectionary States.

Your second question is as follows: If the first question be answered in the affirmative, when did or will such change in the law become operative, and how will such claims from the said State and counties submitted under the former law of March 3, 1871, be affected thereby?

The act of March 3, 1871, as to the matter under consideration taking effect immediately, all such claims have been improperly submitted to the Departments since the 3d day of March, 1871.

The additional question which your letter presents relates to a supposed distinction between property "taken" and property "furnished," as those words are used in the act of March 3, 1871.

These words are not new in statutes upon this subject. They are found in the act of July 4, 1864, and also in the act of February 21, 1867.

The act of July 4, 1864, indicates the different senses in which these words were used by Congress. The property for which the proper officers gave receipts is described as "furnished" to the Army, and that for which the officers did not give receipts is described as "taken." In the latter part of the 2d and 3d sections of the same act, the word "received" seems to be substituted for the word "furnished," but referring to the same transactions; the former word describing the act of the officer, and the latter the act of the owner who delivered the property.

The difference intended by Congress between "taken" and "furnished" seems to be this, that while both words signify such appropriations as were essentially involuntary on the part of the owners, there was an exertion of force in cases of taking which did not exist in cases of furnishing. The giving of receipts in the latter, and the failure to give receipts in the former, indicates in the one case a ready submission by the owner to the caption of his property, which is wanting in the other.

Attorney-General Evarts construed these acts (of July 4, 1864, and February 21, 1867) not to comprehend accounts founded upon express contracts for the purchase of supplies for the Army made by the proper agents of the Government within the scope of the appropriation acts. (12 Opins., 439.)

Delivery of Letters.

Following that opinion, which I believe to be sound, I think that none of the acts which I have cited forbid the payment of such accounts.

The claim of John T. Lee, to which your letter refers, is reported as a case of appropriation by the officers, and not of ordinary contract between the Government agents and Mr. Lee.

Hence I am of opinion that it falls within the scope of the act of March 3, 1871, and must go before the board of commissioners for which that act provides.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. GEO. S. BOUTWELL,

Secretary of the Treasury.

DELIVERY OF LETTERS.

Reconsideration of the case mentioned in opinion of March 25, 1871, (*ante*. p. 395,) upon additional information since received.

It appearing that the order of the court, there referred to, not only enjoined the postmaster from delivering the letters in controversy to one of the contending parties, but commanded him "to refrain from withholding them" from the other party to the suit: Advised, further, that the postmaster be directed to disregard the latter branch of the said order.

DEPARTMENT OF JUSTICE,

April 7, 1871.

SIR: When I prepared the opinion on the subject of the injunction obtained in the court of common pleas of Knox County, Ohio, against the postmaster at Mount Vernon in that State, which was sent to you on the 25th of March last, I had not seen a copy of the order of injunction issued in the case. The information which I had received led me to suppose that the injunction went no further than to restrain the postmaster from delivering the letters in question to one of the contending parties until the question of ownership should be finally settled by the court.

But your communication of the 6th instant incloses a copy of the order, which appears to be not only a restraining injunction of the effect above stated, but also a mandatory in-

Delivery of Letters.

junction commanding the postmaster, his "agents, servants, and employés to refrain from withholding from the said C. and J. Cooper & Company, or their legally authorized agents, all letters coming into your possession addressed Cooper & Clark, C. and J. Cooper, C. and J. Cooper & Company, and C. Cooper & Company." In short, this State court undertakes not only to determine the questions of ownership and identity between the parties litigant, and to withhold the letters in dispute from one of the parties until the final decision, but also undertakes by this preliminary order to direct the postmaster how he shall perform his official duties.

The principle upon which the court assumes this authority would authorize it to supervise and direct any officer of the United States in the execution of those duties which are imposed upon him by the laws of the United States. Such a principle would expose the Government to constant embarrassments and interruptions in all its functions, and is therefore utterly inadmissible unless it shall be found to have a sanction in law which has been hitherto unknown and unsuspected.

It seems to me entirely safe and proper that the postmaster should retain letters addressed to firms now extinct until the civil courts decide which of the contending parties is the legal successor to such firms. But it is unsafe and improper to allow a State court to undertake the management of a United States post-office.

According to the general American practice, an injunction can only forbid, and cannot command. Its office is restraining and mandatory. I am not advised whether such a limitation upon that form of remedy exists in the State of Ohio. But if it does not, an application of the process in the circumstances of the present case to an officer of the United States is without justification in reason and apparently without justification in law.

I therefore advise that the postmaster at Mount Vernon, Ohio, be directed to disregard all that part of the injunction which in the curious phrase of the court commands him to "refrain from withholding from the said" plaintiffs the letters addressed to the extinct firms, and that directions be given to the district attorney of the United States for the

Dakota Territory.

northern district of Ohio to defend the postmaster in any proceedings which may be instituted against him for such disobedience, and to take steps to bring the matter, in the event of an adverse judgment in the State courts, to the Supreme Court of the United States. If you signify to me that such is the desire of the Post-Office Department, I will accordingly give immediate directions to the district attorney.

The papers are herewith returned. Please send them back to me if you wish the instructions given as suggested. I will again return them, but need them to draw the instructions.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. J. A. J. CRESWELL,
Postmaster-General.

DAKOTA TERRITORY.

- The special session of the legislature of Dakota, called by the acting governor of the Territory to meet April 18, 1871—a regular session having met in the latter part of the year 1870—held to be unauthorized by law; the act of March 3, 1869, providing that the sessions shall be biennial, and containing no exception for the case of a special session.

DEPARTMENT OF JUSTICE,

April 15, 1871.

SIR: Your letter of the 13th instant requests my opinion upon the following question: The acting governor of the Territory of Dakota has called a special session of the legislative assembly of that Territory to begin on the 18th instant, and you wish to know whether, in my opinion, such a session is authorized by law.

In the act of March 3, 1869, making appropriations for the legislative, executive, and judicial expenses of the Government for the year ending the 30th June, 1870, it is provided that the sessions of the legislative assemblies of the several Territories shall be biennial, (15 Stat., 300.) No exception is made in the case of a special or called session.

In the act organizing the Territory and in the several acts amendatory, the powers of the governor are prescribed.

Register of Wills for the District of Columbia.

Among them I find no authority to call a special session of the legislature.

A regular session of the legislature was held in the latter part of last year; and a session held under the call of the acting governor at the time appointed, within a few months from the close of the regular session, will be clearly in contravention of the letter of the act of Congress, and of the purpose for which that act was passed, to wit, the prevention of the frequent sessions of territorial legislatures, and will be unauthorized by law.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. HAMILTON FISH,
Secretary of State.

REGISTER OF WILLS FOR THE DISTRICT OF COLUMBIA.

The appointment of the register of wills for the District of Columbia is with the President, by and with the advice and consent of the Senate, and the tenure of the office is at the pleasure of the President, subject to the modification prescribed by the tenure of office acts.

DEPARTMENT OF JUSTICE,

April 15, 1871.

SIR: You have required my opinion upon the application of Mr. A. Webster, register of wills for the district of Columbia, for an amendment of his commission. He quotes the following paragraph from the constitution of Maryland: "That the chancellor, all judges, * * * and the register of wills shall hold their commissions during good behavior, removable only for misbehavior or conviction in a court of law." This provision was in force in what is now the District of Columbia at the time of the cession by Maryland.

Mr. Webster conceives that it is in force still, and that his commission ought to run "during good behavior" instead of "during the pleasure of the President."

If his office were created by the constitution of Maryland, and there had been no authorized legislation modifying the tenure, his claim would be well founded. But the Constitution of the United States gives to Congress the power of

Register of Wills for the District of Columbia.

"exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the Government of the United States."

In pursuance of this power, Congress, after the cession by Maryland of the territory now comprised in the District of Columbia, enacted as follows: "That there shall be appointed in and for each of the said counties (Washington and Alexandria) a register of wills, and a judge to be called the judge of the orphans' court, who shall each take an oath for the faithful and impartial discharge of the duties of his office; and shall have all the powers, perform all the duties, and receive the like fees, as are exercised, performed, and received by the registers of wills and judges of the orphans' court within the State of Maryland, and appeals from the said courts shall be to the circuit court of said district, who shall therein have all the powers of the chancellor of the said State." Act of February 27, 1801, sec. 12, (2 Stat., 107.)

This act, and not the constitution of Maryland, creates the office which Mr. Webster now holds.

Under the power of exclusive legislation given in the Constitution, Congress may supersede in this District, not only the statutes, but also the constitution of Maryland. The act of Congress which I have quoted retains the powers, the duties, and the fees pertaining to the office of register of wills under the laws of Maryland, but does not retain the tenure of office prescribed in that State. It is silent on the subject of tenure, and according to the decision of the Supreme Court in *Ex parte Hennen*, (13 Pet., 230,) offices to which no duration is prescribed by law, are held at the pleasure of the appointing power.

The President has the power, by and with the advice and consent of the Senate, to appoint all officers of the United States whose appointments are not otherwise provided for. (Constitution of the United States, Art. II, section 2.) There being no other provision by law for the appointment of register of wills, the appointment is with the President, with the advice and consent of the Senate, and the tenure of the office is the President's pleasure, under the modification prescribed by the recent acts known as the tenure of office acts.

Fort Trumbull, Connecticut.

I am, therefore, of the opinion that the change which Mr. Webster desires in his commission is not authorized by law.

Very respectfully, your obedient servant,

A. T. AKERMAN.

The PRESIDENT.

FORT TRUMBULL, CONNECTICUT.

The purchase by the United States of the land occupied by Fort Trumbull, Connecticut, and the consent of the State legislature to the purchase, though a formal cession of jurisdiction is wanting, give to Congress the exclusive power of legislation over the purchased land.

DEPARTMENT OF JUSTICE,

April 15, 1871.

SIR: In answer to the request in your letter of March 27th last, for my opinion upon the question of the jurisdiction of the United States over the land occupied by Fort Trumbull, Connecticut, I have the honor to say that, in my opinion, the jurisdiction of the United States is unquestionable.

It is not questioned that the land is owned by the United States, or that the purchase was with the consent of the legislature of the State. There is wanting a formal deed of cession which the legislature intended should be executed on the part of the State. Such a formality is not necessary to give jurisdiction.

The purchase by the United States, and the consent of the legislature to the purchase, gave to Congress the exclusive power of legislation over the purchased land, (Constitution of the United States, Art. II, sec. 8.) A legislative consent to the purchase could be given either before or after the purchase, and such consent, whenever given, together with the fact of the purchase, establishes the jurisdiction of the United States, (7 Opins., 628.)

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. WM. W. BELKNAP,

Secretary of War.

Army Officers unfit for Discharge of Duty.

ARMY OFFICERS UNFIT FOR DISCHARGE OF DUTY.

The act of July 15, 1870, authorized any officer to be reported under its provisions as unfit for the proper discharge of his duties, either by the General of the Army, or by the *commandant of the department* in which the officer was at the time serving; and it was within the competency of the board constituted under that act, in either case, to entertain and pass upon the report so made.

DEPARTMENT OF JUSTICE,
April 15, 1871.

SIR: Your letter of the 19th of January last submits a legal question arising in the case of Major John P. Sherburne, assistant adjutant-general in the United States Army, who was mustered out of service on the recommendation of the Army examining board appointed under the 11th section of the act of Congress of July 15, 1870, (16 Stat., 318.)

That section provides "That the General of the Army, and commanding officers of the several military departments of the Army, shall, as soon as practicable after the passage of this act, forward to the Secretary of War a list of officers serving in their respective commands deemed by them unfit for the proper discharge of their duties from any cause except injuries incurred or disease contracted in the line of their duty, setting forth specifically in each case the cause of such unfitness."

The Secretary of War was directed by said act to constitute a board of five officers; and it proceeds, "and on recommendation of such board the President shall muster out of the service any of the said officers so reported, with one year's pay."

Major Sherburne was in the list forwarded to the Secretary of War by the General of the Army. He was serving at the time in the department of Columbia, on the staff of Major-General Canby, commanding that department. He contends that the board acquired no jurisdiction in his case, because his name was not in the list forwarded by the commanding officer of the department in which he was then serving.

Compensation of Officers in the Army.

The act gave jurisdiction over officers reported by the General of the Army, as well as over those reported by the commanding officers of the several military departments. The command of the General of the Army extends over all of the departments, and each of the commanding officers described in the act is the immediate commander of his own department in subordination to the General of the Army.

The statute requires from the General of the Army and the commanding officers of the several military departments a list of officers "serving in their respective commands" deemed unfit. The language is not "serving in their respective departments." The language seems to have been framed for the purpose of describing the general command of the General of the Army as well as the particular commands of the officers commanding each military department. The General of the Army having the particular and immediate command of no department, the statute imposed no duty upon him unless his command embraced all the departments. But the act supposes him to have a command in which there might be officers deemed by him unfit for a proper discharge of their duties, &c., and this command can be found nowhere, unless it embraces all the military departments.

I am thus brought to the conclusion that any officer reported as unfit, either by the General of the Army or the commander of the department in which he was serving at the time, was legally before the board, and was legally mustered out of the service by the President, upon the board's recommendation.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. WM. W. BELKNAP,

Secretary of War.

COMPENSATION OF OFFICERS IN THE ARMY.

A non-commissioned officer of Illinois volunteers, in the service of the United States, was appointed by the colonel of his regiment to the command of a company on the 6th of March, 1863, to fill a vacancy caused by resignation, and entered upon the duties of his new position; on the 3d of April, 1863, he was commissioned by the governor of Illinois

Compensation of Officers in the Army.

as captain of said company, to take rank from the date first mentioned; but, on account of military operations and other causes beyond his control, he did not receive the commission, nor was he mustered as captain, until the 2d of June, 1863; claim being made by him for compensation as captain from March 6, 1863, to June 2, 1863: *Held* that, under the resolutions of July 26, 1866, and July 11, 1870, he is entitled to a captain's pay from the 3d of April to the 2d of June, but that the claim for the other part of the period covered thereby is not well founded.

DEPARTMENT OF JUSTICE,

April 29, 1871.

SIR: Your letter of the 29th ultimo requests my opinion upon the questions whether A. C. Little is entitled to pay as captain in the United States Army under the joint resolution of July 26, 1866, (14 Stat., 368,) and July 11, 1870, (16 Stat., 385.)

On the 6th day of March, 1863, Mr. Little, then first sergeant of Company K, 127th Regiment Illinois Volunteers, in the army under General Grant near Vicksburgh, was appointed by his colonel to the command of said company in place of Captain Lowe, resigned. On the 3d of April, 1863, Governor Yates, of Illinois, commissioned him as captain of said company, to take rank as captain from the 6th day of March, 1863. On account of military operations and other causes beyond the control of Mr. Little, he did not receive the commission and was not mustered as captain until the 2d day of June, 1863. The present claim is for compensation as captain from March 6, 1863, to June 2, 1863.

The resolution of July 26, 1866, provides that in every case in which a commissioned officer actually entered on duty as such, "but by reason of being killed in battle, capture by the enemy, or other cause beyond his control, and without fault or neglect of his own, was not mustered within a period of not less than thirty days, the Pay Department shall allow to such officer full pay and emoluments of his rank from the date on which such officer actually entered on such duty as aforesaid."

The resolution of July 11, 1870, amends the resolution just quoted, so that "in all cases arising under the same the person to whom the commission shall have issued shall be con-

Commission for Settling Spanish Claims.

sidered as commissioned to the grade named therein from the date when the commission was issued by competent authority, and entitled to all pay and emoluments as if actually mustered at that date: *Provided*, That, at the time of the issuing of the same he was performing the duties of the grade to which he was commissioned."

Captain Little's commission was issued by competent authority on the 3d day of April, 1863. He was then performing the duties of captain. These facts bring his case within the operation of the resolution of July 11, 1870, and entitle him to pay as captain from the 3d day of April to the 2d day of June, 1863, the day when he was mustered.

The argument which has been made against his claim from the 3d section of the resolution of July 11, 1870, appears to me unsound. That section makes the resolution inapplicable "to cases in which, under the laws and Army regulations existing at the time, there could have been no lawful muster into service even after the actual receipt of the commission." The facts reported to me do not bring Captain Little's case within this exception. If he had received his commission when it was issued on the 3d day of April, he could have been lawfully mustered into the service as captain. There was a vacancy; his commission to fill it was valid; and there was nothing to prevent him from being lawfully mustered into service after the actual receipt of the commission.

His claim to pay as captain for the time prior to the issuing of his commission, I do not consider well founded.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. Wm. W. BELKNAP,
Secretary of War.

COMMISSION FOR SETTLING SPANISH CLAIMS.

The fund appropriated by the act of March 3, 1871, for the expenses of the commission to settle claims of citizens of the United States against Spain, may be paid to the commissioners and advocate on the part of the United States, from time to time, at the discretion of the President.

Commission for Settling Spanish Claims.

The act establishing the Department of Justice does not prohibit the designation by the President of an advocate on the part of the United States.

DEPARTMENT OF JUSTICE,

April 29, 1871.

SIR: Your letter of the 26th instant requests my opinion as to the mode of appointing the advocate on the part of the Government in the arbitration to settle the claims upon Spain of citizens of the United States for injuries done by the authorities in the island of Cuba, and of providing for his compensation.

The act of March 3, 1871, (16 Stat., 495,) appropriates the sum of \$15,000 for the compensation and expenses of a commission for determining the questions pending between the United States and Spain, growing out of the acts of the Spanish officials in and about Cuba. The arrangement for the commission or arbitration provides that there shall be an advocate on the part of each power, and that his compensation shall be the same as that of an arbitrator.

The pay of the advocate on the part of the United States is fairly within the significance of this appropriation. By the terms of the arrangement he is as essential a part of the commission as the arbitrators themselves.

Although there is a provision in the arrangement that the expenses of the arbitration shall be defrayed by a percentage to be added to the amount awarded, I am of the opinion that this provision does not prevent the application of the money thus appropriated to the compensation of the advocate. Congress probably considered that there would be an inconvenience in deferring the payment of the commissioners and advocate until the payment of the amount awarded, and therefore made this appropriation, expecting the amount which may be paid under it to be re-imbur sed to the Treasury when the award shall be paid.

I am therefore of the opinion that the moneys so appropriated by Congress can be paid to the commissioners and advocate on the part of the United States from time to time, at the discretion of the President.

I am also of the opinion that the act to establish the Department of Justice does not prohibit the designation by the

Allowances for Servants of Army Officers.

President of the advocate on the part of the United States. His function is of a peculiar nature, created by the agreement between the two powers, and sanctioned by the act of Congress above quoted, and does not belong to the class of professional services which that act confines to the Department of Justice.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. HAMILTON FISH,

Secretary of State.

ALLOWANCES FOR SERVANTS OF ARMY OFFICERS.

Under the act of July 15, 1870, the allowance to officers in the Army of fuel and quarters in kind for their servants is still authorized to be made.

The same act, however, does not authorize transportation in kind for such servants to be furnished at the expense of the United States, or re-imbursement in money to the officers for the cost thereof.

DEPARTMENT OF JUSTICE,

May 6, 1871.

SIR: Your letter of the 1st instant submits two questions:

1. Does the act of July 15, 1870, making appropriations for the support of the Army, authorize or permit the allowance to officers of fuel and quarters in kind for servants?
2. Does that law authorize or permit transportation in kind for officers' servants at the expense of the United States, or re-imbursement in money to officers for cost of their servants' transportation?

The 24th section of that act (16 Stat., 320) fixes the pay of the officers of the Army, and then provides that "these sums shall be in full of all commutation of quarters, fuel, forage, servants' wages, and clothing, longevity rations, and all allowances of every name and nature whatever: * * * Provided, That fuel, quarters, and quarters in kind may be furnished to officers by the Quartermaster's Department as now allowed by law and regulations: And provided further, That when any officer shall travel under orders, and shall not be

Bridge at Old Point Comfort, Virginia.

furnished with transportation by the Quartermaster's Department, or on a conveyance belonging to or chartered by the United States, he shall be allowed ten cents per mile and no more for each mile actually by him traveled under such orders."

My opinion is that this first proviso continues all the allowances in kind of fuel and quarters which officers received under the laws and regulations in force when the act was passed ; and as those included fuel and quarters for the prescribed number of servants, the same allowance should still be made.

The second proviso gives a mileage in money to an officer traveling under orders and not furnished with transportation by the Quartermaster's Department or a conveyance belonging to or chartered by the United States, and by necessary implication authorizes transportation in kind, but for nobody except the officer himself. If this proviso, like the first, continued in force existing laws and regulations on the subject to which it refers, I should hold it to include the servants as well as officers ; but no words of such import are found in it, and, therefore, the very comprehensive declaration in the earlier part of the act, that "these sums shall be in full of all allowances of every name and nature whatever," is left without any modification in relation to transportation for servants.

Very respectfully, your obedient servant,

A. T. AKERMAN,

Hon. GEORGE S. BOUTWELL,
Secretary of the Treasury.

BRIDGE AT OLD POINT COMFORT, VIRGINIA.

The act of the Virginia legislature of January 14, 1871, providing for a cession of jurisdiction over the bridge across Mill Creek, at Old Point Comfort, Virginia, owned by the Government, proposes in effect that the United States shall have exclusive jurisdiction over the bridge and its abutment (with concurrent jurisdiction in the State for the execution of process) so long as the bridge is kept up and maintained by the Government for military purposes, and the public are permitted to pass

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over the same free of charge, and no longer: *Advised* that there would be no impropriety in accepting the grant of jurisdiction executed by the governor of the State in pursuance of said act, upon the terms proposed.

DEPARTMENT OF JUSTICE,

May 18, 1871.

SIR: Your letter of the 19th ultimo, inclosing a deed from the governor of Virginia, ceding the jurisdiction of a certain toll-bridge across Mill Creek, in the State of Virginia, to the United States, requests my opinion as to the validity of said deed and the propriety of the acceptance of it by the United States, upon the conditions imposed by the act of the legislature of Virginia authorizing the cession.

Touching the first point: As the deed appears upon its face to be executed in exact conformity to the statute authorizing it, both in regard to matter and in regard to manner, I perceive no reason to doubt its validity.

What follows may aid in arriving at a correct conclusion upon the other point, which presents rather a question of administrative expediency than of law.

By an act of the Virginia legislature, passed January 27, 1825, the county court of Elizabeth City was empowered to authorize the erection of (among other things) a toll-bridge "from some point on the north side of Mill Creek across said creek to the extreme point of Old Point Comfort, on the opposite side." The act provided for ascertaining by a jury the damages which the owners of lands would sustain by reason of the establishment of the abutments of the bridge, and required the damages assessed by the jury to be paid by the person or persons applying to erect the bridge, before granting the privilege, and to require bond and security of the owners thereof, in such penalty as to the court might seem proper for keeping the same in order.

An act was subsequently passed by the legislature of the same State on the 18th of January, 1828, entitled "An act to incorporate the Hampton River and Mill Creek Toll-Bridge Company," which provided that subscribers of stock in the Hampton River and Mill Creek toll-bridge, and their successors, should be, and were, thereby constituted a body corporate under the name and style aforesaid, and should have per-

Bridge at Old Point Comfort, Virginia.

petual succession, and a common seal, with power to sue and be sued, implead and be impleaded in any court of law and equity; and furthermore, that said company should have power from time to time to make and establish such by-laws, rules, and regulations, not contrary to the laws or constitution of the State or the United States, as they may judge necessary, and to appoint all such officers as they may deem necessary to attend to the affairs of said company. The act imposed no conditions upon the company beyond what are here mentioned.

By an act of Congress approved July 7, 1838, (5 Stat., 284,) an appropriation of \$4,000 was made "for the purchase of the charter-right to the bridge across Mill Creek at Fort Monroe."

And on the 15th of November, 1838, by a deed of that date, the Hampton River and Mill Creek Toll-Bridge Company, in consideration of the sum of \$4,000, sold and conveyed to the United States all the right, title, and interest of the said company "in and to a certain toll-bridge, and the abutment thereof, across Mill Creek, in the county of Elizabeth City, erected in pursuance of" the aforesaid act of January 27, 1825, "with all the appurtenances to the said toll-bridge hereby conveyed, belonging, or in any manner appertaining, together with the right of road between said toll-bridge and the bridge across Hampton River," &c., and "all the rights, privileges, and immunities connected with, and incident to, the said toll-bridge hereby conveyed, derived by the said Hampton River and Mill Creek Toll-Bridge Company from the act of the general assembly aforesaid, and from the act incorporating the said company, passed the 18th of January, 1828," *habendum* "to the United States of America to their only proper use and behoof forever." This instrument was executed by the president of the company, in pursuance of a resolution passed by the same, on the 27th of July, 1838, which is recited in the deed.

It may be remarked here that the privilege of establishing the bridge was conferred upon the company with a view to the public use and accommodation; and that although, in the absence of any restrictions in the act under which that privilege was granted, or in the act of incorporation, it was,

Bridge at Old Point Comfort, Virginia.

perhaps, competent to the company to alienate the bridge, yet the right of alienation must be deemed to have been capable only of being exercised consistently with the public purposes referred to, and not otherwise. So that the ownership acquired by the United States under the transfer from the company was nothing more than a qualified ownership, being subject to the public use of the property as regulated by the local law, and, moreover, subject to the burden of keeping the same in order. Whether the United States ever claimed or exercised the right to collect tolls by virtue of said transfer, does not appear; however, if the transfer was valid and effectual, such right would seem to have passed, if not by the terms of the grant, as an incident to it.

Thus stood the matter, as it respects the ownership of the bridge and abutments, at the time of the passage of the act of the Virginia legislature of January 14, 1871, providing for the cession of the jurisdiction over the same.

This act empowers the governor of the State, for and in its behalf, to grant such jurisdiction to the United States, subject to certain conditions, which are in substance as follows:

1. That the United States shall observe and keep all the conditions imposed by the charter of incorporation of said company, *passed January 27, 1825*; upon failure whereof the cession to be void.

2. That in case the bridge is suffered to fall into decay, or the United States ceases to use it for military purposes, the jurisdiction is to revert to the State.

3. That the United States shall not exact toll from the public for passing over the bridge, nor prevent the officers of the State from executing process on the premises.

In authorizing a qualified cession of jurisdiction, the act may be taken to impliedly give a qualified sanction to the previous conveyance of the bridge to the United States, the effect of which is to obviate, to a corresponding extent, any objection to the validity of the title arising from inability (if such existed) on the part of the company to convey.

As to the first of the conditions enumerated above, it will be seen by reference to the act of incorporation of said company, that it was not passed January 27, 1825, as stated in the condition under consideration, but *January 18, 1828*, (and

Bridge at Old Point Comfort, Virginia.

is, in fact, so recited in the deed of conveyance from the company to the United States,) and also that *no conditions whatever* are thereby imposed concerning the bridge. This condition, then, may be regarded as mere surplusage.

The next condition is not, in any point of view, open to objection. As a proprietor, the United States, it has been shown, are clearly subjected to the burden of keeping the bridge in repair. This condition will not impose upon the United States, as a sovereign, any greater burden ; and there is little probability that, after the Government discontinues the use of the bridge for military purposes, it will care to retain its jurisdiction over the same.

The last condition, so far as it restrains the United States from taking tolls, may be a limitation upon an existing right, (assuming that such right passed to the Government under the transfer of the bridge by the company,) but a right that has probably never been exercised by the Government and doubtless never would be. It does not, in any respect, limit or affect the proprietary interest of the Government, which, as it seems, is but a qualified one, being subject to the public use of the property. And so far as the condition preserves to the State officers the right to execute process on the premises, it contains nothing novel or unusual.

In short, the act proposes this : that the United States shall have exclusive jurisdiction over the bridge and its abutment, (with concurrent jurisdiction in the State for the execution of process,) so long as the bridge is kept up and maintained by the Government for military purposes, and the public are permitted to pass over the same free of charge, and no longer.

I perceive no impropriety in accepting the grant upon the terms proposed. Practically, it will not change the existing proprietary relations of the United States, while in other respects it would be attended with advantage.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. WM. W. BELKNAP,

Secretary of War.

Fishing Bounties.

FISHING BOUNTIES.

Where a fishing-smack, having complied with all the conditions required by the law relating to fishing bounties except the return to port, was captured on its way home by a confederate privateer and destroyed: *Held* that the capture and destruction constituted a loss of the vessel within the meaning of the act of May 26, 1824, and that the owner and crew are accordingly entitled, under the provisions of that act, to the same bounty they would have been allowed had the smack returned to port.

DEPARTMENT OF JUSTICE,
May 31, 1871.

SIR: The case of the fishing-smack "Rufus Choate," presented in your letter of the 26th of April last, is this: "That vessel having complied with all the conditions required by the law providing for the payment of a fishing bounty except the return to port, was taken and destroyed on its way home with a full cargo of cod-fish, on the 22d day of June, 1863, by the confederate privateer Tacony."

The act of May 26, 1824, (4 Stat., 38,) enacts that when such vessel "shall, in returning to any port within the United States, be wrecked or lost, the owner or owners and crew of such vessel shall, on satisfactory proof being made to the Comptroller of the Treasury of the wreck or loss of such vessel, be entitled to the same bounty as would have been allowed had such vessel returned to port."

The question upon which you ask my opinion is, whether the capture and destruction of this vessel by the "Tacony" is such a loss as to bring her within the terms of this act.

Looking at the object of the laws granting fishing bounties, to wit, the encouragement of this species of industry, and at the object of the act of 1824, to wit, the relief of parties interested in the matter of bounty from the consequences of inevitable misfortunes, I can come to no conclusion but that the prevention of the return of the vessel by hostile capture was not intended to work a forfeiture of the bounty any more than a prevention of her return by force of the elements. Hence I am of opinion that the owners, master, and crew of

Eight-Hour Law.

this vessel are entitled to the same bounty as would have been allowed had she returned to port.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. GEORGE S. BOUTWELL,

Secretary of the Treasury.

EIGHT-HOUR LAW.

The act of June 25, 1868, declaring that "eight hours shall constitute a day's work," left the subject of compensation to be regulated upon principles in force at the time of its passage. The President, by proclamation dated May 19, 1869, directed that thereafter no reduction should be made in the wages of Government employés on account of the reduction in the hours of labor: *Held* that persons serving the Government as laborers, workmen, and mechanics are not entitled to receive, for the period intervening between the date of the act and the date of the proclamation, the wages of a day of ten hours for working eight hours—the Government being under no obligation to pay more for the past because it has agreed to pay more for the future.

DEPARTMENT OF JUSTICE,

May 31, 1871.

SIR: Your letter of the 23d instant requests my opinion as to the interpretation to be placed upon the President's proclamation of May 19, 1869, directing that no reduction shall be made, from and after that date, in the *per diem* wages paid to laborers, workmen, and mechanics, on account of reduction of the number of working-hours consequent upon the act of June 25, 1868, and whether or not workmen are entitled to extra compensation for extra working-hours (over eight) from the passage of the act to the date of the President's proclamation.

The act of June 25, 1868, (15 Stat., 77,) declares that "eight hours shall constitute a day's work for all laborers, workmen, and mechanics now employed, or who may be hereafter employed, by or on behalf of the Government of the United States."

As this act was construed by Attorney-General Evarts, (12 Opns., 530,) and by Attorney-General Hoar in an opinion of April 20, 1869, (*ante*, p. 29,) it did not relate to compensation,

David's Island.

but only to the hours of labor, and the compensation was left to be regulated upon the principles in force at the time of its passage.

The President's proclamation of May 19, 1869, directed that, from and after that date, no reduction should be made in wages on account of the reduction, wrought by that act, in the hours of labor. The proclamation, by its terms, is to have effect from and after its date. Persons serving the Government as laborers, workmen, and mechanics after that date received from that proclamation a notice that the statutory reduction of the hours of labor would not reduce their pay; and, consequently, this entered into their contracts with the Government for labor. Previously to that proclamation there was no statutory or executive announcement that they would receive their wages of a day of ten hours for working eight hours. They served the Government without any authorized expectation of receiving more than the customary wages, and nothing more is justly due to them.

The subject of wages is a matter of contract, either expressed or implied; and while the Government should most scrupulously keep its faith by paying to persons in its service all that it engages to pay, it is under no obligation to pay more for the past because it has agreed to pay more for the future.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. WM. W. BELKNAP,

Secretary of War.

DAVID'S ISLAND.

The reservation in the deed of Simeon Leland and wife, conveying David's Island, in Long Island Sound, to the United States, of "the right of ferriage to and from said premises," secures to the grantors a right to use so much of the island as may be needed for the purpose of a ferry, whether public or private, and for no other purpose.

The Government, however, is under no obligation to use a ferry kept by the grantors, but may, simply as a riparian proprietor, establish one for its own accommodation.

David's Island.

It may also allow others than the grantors to land boats at the island, and to transport thereto and therefrom passengers or freight, and may avail itself of the facilities for communication thus afforded.

DEPARTMENT OF JUSTICE,

June 2, 1871.

SIR: The case presented in your letters of January 20 and March 23, 1871, is as follows:

On the 13th of April, 1862, by a deed of that date, Simeon Leland leased to the United States, at a stipulated rent, for the term ending April 1, 1863, "all that certain island surrounded by the waters of Long Island Sound opposite the mouth of the Lower New Rochelle Harbor, called and known by the name of David's Island, containing about eighty acres." Among other provisions in the lease was one securing to the United States the privilege of purchase at the price of \$38,500, during the continuance of the lease, and also reserving to the lessor "*the right of ferriage to and from said premises.*" On the 30th of March, 1863, the lease was, by written agreement, extended for the term of four years longer.

By a joint resolution approved February 18, 1867, (14 Stat., 566,) the Secretary of War was directed to purchase said island "in accordance with the terms and conditions of the lease of Simeon Leland, dated April 13, 1862, and renewed March 30, 1863."

On the 11th of May, 1867, a deed was executed by Leland and wife granting to the United States for the consideration of \$38,500 the whole of the island and its appurtenances in fee, but reserving to the said Leland, his heirs, executors, administrators, and assigns, "*the right of ferriage to and from said premises.*" This deed was tendered to, and afterward accepted by, the Government, and the purchase-money paid over; the legislature of New York having in the mean time passed an act ceding to the United States jurisdiction over the island. (See N. Y. Laws, 1868, 91st sess., chap. 257.)

That act declares: "Jurisdiction is hereby ceded to the United States over certain lands situated in the harbor of New Rochelle, and known as David's Island, the same to be purchased and used by the United States for military purposes: *Provided, however,* and this act is upon the express condition, that all civil and criminal processes issued under the au-

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thority of this State, or of any officer thereof, may be executed on said David's Island, and in the buildings that are or may be erected thereon, in the same manner as if jurisdiction had not been ceded as aforesaid."

Referring to the reservation contained in the above-mentioned deed from Leland and wife of "the right of ferriage to and from said premises," the Quartermaster-General, in his communication to the Secretary, submits the following questions:

1. "Does this give him [Leland] an exclusive right—the right to prevent any boats but those owned or licensed by him communicating with the island ?
2. "Is the United States a prisoner in the island in the hands of Mr. Leland, and having no rightful means of communicating with the rest of the world but by his boats and his permission ?
3. "Is it the duty of the United States, by its officers, to prevent any boats, not licensed by Mr. Leland, landing at the island and bringing persons, provisions, and other things to or taking them from the island ?
4. "Is the United States bound to take active measures in protecting Mr. Leland's ferriage-rights ? or
5. "Is it only obliged to permit him to ferry persons back and forth ?
6. "Must he himself enforce his rights against other parties ?"

By reference to the foregoing statement it will be observed that the language of the reservation in the deed of conveyance is precisely the same as the language of the reservation in the deed of lease, which latter reservation should, I think, be considered in determining the scope and effect of the former.

Whether, at the time of the execution of the lease, there was a public ferry to and from the island in the ownership of the lessor, does not appear from the papers. If one existed, it may be safely assumed that the ferry-right itself was held, not simply as an appurtenance to the island, or in virtue of riparian ownership merely, but as a franchise conferred by and subject to the regulation and control of the State; the rule that generally prevails throughout this country being

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that a party cannot, even on his own land, set up a *public* ferry without the consent of the State, though in the absence of a statutory prohibition he may establish a private one for his own convenience, as of common right, if he chooses to do so. The rule at common law was the same. Thus Sir Matthew Hale, in his *De Jure Maris*, observes: "The king, by ancient right of prerogative, hath had a certain interest in any fresh rivers, even where the sea doth not flow and reflow, as well as in the salt or arms of the sea, and there are those which follow: first, a right of franchise or privilege that no man may set up a common (public) ferry for all passengers, without a prescription time out of mind, or a charter from the king. He (the owner) may make a ferry for his own use or the use of his family, but not for the common use of all the king's subjects passing that way." And the reason he gives is, "Because it doth in consequence tend to a common charge, and is become a thing of public interest or use, and every man for his passage pays a toll, which is a common charge, and every ferry ought to be under public regulation; that is, that the owner give attendance at due times, keep a boat in due order, and take but a reasonable toll; for if he (the ferryman) fail in these, he is finable." So that, if there had been no reservation or exception in the lease, the ferry franchise would not necessarily have passed to the lessee without words of grant clearly including it; and as the lease contained no such words of grant, it is very obvious that no reservation or exception was required to prevent a transfer of the franchise. But with regard to the ferry landing, unless perhaps this was on a public highway, it would have been otherwise.

Accordingly, in case of the existence of a public ferry at the period referred to, the reservation in the lease could, as I conceive, have no other operation than to preserve to the lessor, during the continuance of the lease, (not the right of ferry, but) the right to use so much of the premises demised as the purposes of the ferry required for embarking and disembarking passengers, &c.; in other words, the right of a ferry landing thereon.

So, if a public ferry did not then exist, the reservation in the lease could operate no further than to secure to the lessor a similar right in the event of one being thereafter estab-

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lished by him under the authority of the State; and it could have no different operation with reference to the establishment of a private ferry. It certainly could not impart to the lessor the right to set up a public ferry; while the right to establish a private one, except so far as this might depend upon the right to a landing-place, would exist irrespective of it.

Furthermore, the reservation imposed no obligation upon the lessor to set up and maintain a ferry either for the accommodation of the public or for that of the lessee; nor, on the other hand, does it appear to have imposed any obligation upon the lessee to use exclusively a ferry kept and maintained by the lessor; or to take active measures in protecting the lessor in his ferry rights, such as they were, against the intrusion of third parties; or to prevent boats, not licensed by the lessor, from landing at the island. And I am unable to find anything in its terms which can be taken, expressly or impliedly, to have restrained the lessee from landing, or from conferring upon any one else the privilege of landing, boats at the island, and receiving or discharging passengers and freight there, provided the lessee in so doing did not interfere with the rights reserved to the lessor, which, as it would seem, was nothing more than a right of landing for similar purposes.

Now, in my judgment, the rights and obligations arising out of the reservation in the deed of conveyance, both in their nature and extent, correspond exactly with those which arose out of the reservation in the lease. The language of each, as has already been remarked, is the same, and, besides, the act authorizing the purchase of the island, in directing it to be made in accordance with the terms of the lease, excludes the idea that Congress contemplated that the vendor should have, under any reservation or provision in the deed to be given by him, other or greater rights than he enjoyed under the reservation in his lease. He cannot, then, be regarded as having acquired from the United States, by virtue of the reservation in said deed, a *ferry franchise* to and from the island, (and I do not understand that he claims this,) but only as having secured to himself a right to use so much of the island as may be needed for the purpose of a ferry, whether

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public or private, and for no other purpose. He is under no obligation to keep a ferry, and the Government is under none to use a ferry kept by him. As a riparian proprietor simply, the Government may certainly establish a ferry for its own accommodation; and I perceive nothing in the grant which restrains it from allowing others than the grantor to land boats at the island and to transport thereto and therefrom passengers or freight, or from availing itself of the facilities for communication which may be thus afforded.

Agreeably to these views the first, second, third, and fourth questions propounded by the Quartermaster-General, as enumerated above, are answered in the negative, and the fifth and sixth in the affirmative.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. WM. W. BELKNAP,

Secretary of War.

CENTRAL BRANCH UNION PACIFIC RAILROAD COMPANY.

The provisions of the acts of July 1, 1862, and July 2, 1864, do not authorize the allowance of a subsidy in lands or bonds to the Central Branch Union Pacific Railroad Company, for the construction of a railroad from the present western terminus of its road (one hundred miles from the Missouri River) to the main trunk of the Union Pacific Railroad.

The head of a Department should not dispose of public lands or issue the bonds of the Government in aid of any enterprise, however meritorious, without an unequivocal direction from Congress.

DEPARTMENT OF JUSTICE,

June 3, 1871.

SIR: Your letter of May 8th, 1871, requests my opinion upon certain questions arising upon the application of the Central Branch Union Pacific Railroad Company for a subsidy in lands.

The case is as follows: The acts of July 1, 1862, (12 Stats., 489,) and of July 2, 1864, (13 Stats., 356,) provided for a railroad between certain points on the Missouri River and the eastern boundary of California. The outlines of the plan were these: Four roads were to leave the Missouri River;

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one at Sioux City; one at a point to be fixed by the President on the western boundary of Iowa, (afterwards fixed at Omaha;) one at Atchison; and one at the mouth of the Kansas River; and these were all to unite at or east of a certain point to be fixed by the President on the one hundredth meridian of west longitude, from which the main trunk was to proceed westwardly.

One company, the Union Pacific Company, was incorporated by the first of those acts; and was to build the main trunk and the second of the above branches. The company, then known as the Hannibal and St. Joseph Railroad Company, the assignor of the present applicant, (which, for convenience, I shall call the Central Branch Company,) was to build the third of the above branches. The Leavenworth, Pawnee and Western Railroad Company, sometimes called the Union Pacific Railway Company Eastern Division, sometimes the Kansas Pacific Railway Company, and frequently, in legislation, termed the road through Kansas, (which, for convenience, I shall call the Kansas road,) was to construct the fourth of the above branches. All were to receive subsidies from the Government in lands and bonds, but were placed under different limitations as to location and as to the amount of the subsidies.

The Kansas road (the southernmost branch) was to run from the Missouri River at the mouth of the Kansas River to the aforesaid point on the one hundredth meridian, and was to be so located that certain railroads from Missouri and Iowa, authorized in the act to connect with the same, could make connection within the limits prescribed in the act, provided the same could be done without deviating from the general direction of the whole line to the Pacific coast; and its route in Kansas west of the meridian of Fort Riley to the initial point of the main trunk on the one hundredth meridian was to be subject to the approval of the President of the United States, and to be determined by him on actual survey, (act of 1862, sec. 9.) This road was to receive subsidies for its whole length.

The road next north of this, that of the present applicant, was permitted to connect and unite with the Kansas road upon the same terms and conditions, in all respects, for one

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hundred miles in length next to the Missouri River, as are provided in this act for the construction of the main trunk, but in no event were lands or bonds to be given to said company for a greater distance than one hundred miles.

This Central Branch company has built its road for the distance of one hundred miles from the Missouri River, and its right to receive the subsidies for that length is not questioned. It claims, however, a right to extend its road to the main trunk at the one hundredth meridian, and to be subsidized for this large increase of distance. The foundation of this claim is that the Kansas road with which it had a right to unite has not been built to the main trunk at said point of junction, and that, under the provisions of the 16th section of the act of 1864, it has a right to supply this defect and to receive, from its present western terminus to the point of junction on said meridian, the lands and bonds which the Kansas company would have received if the latter company had constructed its road to said point. The fact is, that the Kansas company, instead of building its road as it first contemplated to the said point on the one hundredth meridian, has changed the direction of its road to what is called the Smoky Hill route, and has made its connection with the main trunk of the Union Pacific Railroad several hundred miles west of the one hundredth meridian, having been authorized to make this change by the 9th section of the act of July 2, 1864, and by the act of July 3, 1866, (14 Stat., 79.)

The 16th section of the act of 1864 first authorized any two or more of the companies to consolidate their organizations. Then "upon the completion by such consolidated organization of either or all the roads of the companies so consolidated," if any other of the companies "forming, or intended or necessary to form, a portion of a continuous line from each of the several points on the Missouri River, hereinbefore designated, to the Pacific coast, shall not have constructed the number of miles of its said road within" the required time, the consolidated organization was authorized to construct its road in the general direction and route upon which the incomplete or unconstructed road was authorized to be built until it should reach the constructed road, and there to connect with the same; and the consolidated organ-

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ization thus constructing, in whole or in part, the road of the other company was to be "entitled to similar and like grants, benefits, immunities, guarantees, acts and things to be done and performed by the Government of the United States * * * in reference to such company and to such portion of the road hereinbefore authorized to be constructed by it, and upon the like and similar terms and conditions, so far as the same are applicable thereto." The section proceeds: "And said consolidated company shall pay to said defaulting company the value, to be estimated by competent engineers, of all the work done and material furnished by said defaulting company which may be adopted and used by said consolidated company in the progress of the work under the provisions of this section: *Provided, nevertheless,* That said defaulting company may at any time before receiving pay for its said work and material as hereinbefore provided, on its own election, pay said consolidated company the value of the work done and material furnished by said consolidated company, to be estimated by competent engineers, necessary for and used in the construction of the road of said defaulting company, and resume the control of its said road; and all the rights, benefits, and privileges which shall be acquired, possessed, or exercised pursuant to this section, shall be to that extent an abatement of the rights, benefits, and privileges hereinbefore granted to such other company." Then follow the words upon which the present application rests: "And in case any company authorized thereto shall not enter into such consolidated organization, such company, upon the completion of its road, as hereinbefore provided, shall be entitled to, and is hereby authorized to, continue and extend the same under the circumstances and in accordance with the provisions of this section, and to have all the benefits thereof as fully and completely as are herein provided touching such consolidated organization."

Before this application can be sustained it must be established—

First. That the Central Branch company has completed its own road.

Second. That the Kansas company has failed to extend its road to the main trunk on the one hundredth meridian, under

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circumstances which make it "a defaulting company" in the sense of the act, and authorize another company to do its work and thereby earn the subsidies which it would have taken but for such default.

In my judgment, neither of these points can be established under authorized rules of construction, and therefore I advise that the application be rejected.

In inquiring whether the Central Branch company has completed its own road, we must ascertain what terminal points were prescribed by the statute. The eastern point, (that is, the only eastern point material in the present inquiry,) was fixed at Atchison, on the Missouri River. The western point was to be (under the option which the company made among several authorized connections) at its junction with the Kansas road. The place of junction was not positively fixed in the statutes. The Kansas road was to be so located that the Central Branch road could be connected with it "within the limits prescribed in the act" of 1862. (See section 9.)

What were the limits so prescribed? In answer to this question, the applicants say that the prescribed limits are the distance of one hundred miles from their eastern terminus at Atchison. But the one hundred miles is a limitation, not upon the length of their road, but upon the distance for which it should be entitled to the subsidy. I find no limit prescribed for the point of connection, except in the obvious intention of the act that the connection should be made before the Kansas road should reach the main trunk.

Section 9 ordained that the route of the Kansas road in Kansas, west of the meridian of Fort Riley to the aforesaid point on the one hundredth meridian of longitude, should be subject to the approval of the President of the United States, and should be determined by him on actual survey. It has been asserted by the counsel for the applicant that this provision was inserted for the purpose of securing such a location of the Kansas road as would allow a convenient connection with it to the Central Branch road. This is probably true, but the statute does not require that the President shall so fix the route that the connection with the Central Branch road shall be within or at one hundred miles from

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Atchison. An inspection of the map makes it probable, nay, almost certain, that Congress expected the junction to be west of the one hundred mile point. But however that may be, it is clear that the western end of the Central Branch road could not be established until the President should have fixed the route of the Kansas road, and the Central Branch company should have chosen its place of connection with such route. These two things not having been done, the western terminus of the Central Branch road is unfixed, and this road, therefore, cannot be pronounced complete. Perhaps the company was unfortunate in having a privilege so beset with contingencies, but it was the will of Congress thus to qualify the privilege conferred, and it was the will of the company to accept the privilege thus qualified. These conclusions are confirmed by the language of section 13 of the act of 1862, which provides that the Central Branch company may extend its road to connect and unite with the Kansas road, "upon filing its assent to the provisions of this act, upon the same terms and conditions, in all respects, for one hundred miles in length next to the Missouri River, as are provided in this act for the construction of" the main trunk. It is apparent here that the Central Branch road is not limited to one hundred miles in length, but that it is to enjoy for no more than one hundred miles "the terms and conditions" provided for the main trunk road. That section further provides that the Central Branch road may, under certain circumstances, connect with the branch leading from Omaha to the main trunk, neither of which connections could possibly be made without greatly exceeding the length of one hundred miles. But to make sure that one hundred miles is the limit of subsidy, and not of distance, the words follow that "in no event shall the lands or bonds be given to said company, as herein directed, to aid in the construction of said road for a greater distance than one hundred miles."

In every possible contingency the Central Branch road must have exceeded one hundred miles, except in the event that the President should have fixed the route of the Kansas road west of the meridian of Fort Riley, so as to bring the point of junction within the one hundred miles, and this event never occurred.

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Upon the second inquiry, we must consider the intention of Congress concerning the Kansas road. This road was to be subsidized with lands and bonds for all the distance from the Missouri River, at the mouth of the Kansas River, to the initial point of the main trunk on the one hundredth meridian, (act of 1862, section 9.) It was to admit to connection the other branch roads from Missouri and Iowa. It was specially authorized to build the main trunk road westward to a meeting with the road from California, upon the completion of its own road to the one hundredth meridian, if the Union Pacific Company should not then be proceeding in good faith to build the main trunk, (act of 1864, section 12.)

By section 9 of the act of 1864, any branch road (this included) was permitted to connect with the main trunk road at any point westwardly of the initial point on the one hundredth meridian, "in case such company shall deem such westward connection more practicable or desirable; and in aid of the construction of so much of its road as shall be a departure from the route hereinbefore provided for its road, such company shall be entitled to all the benefits and subject to all the conditions and restrictions of the act;" but with the proviso, however, that no greater amount of bonds or land should be given to such company than if the same had united with the main trunk at the initial point. Here a departure from the route previously indicated (that is, the route to the initial point) is authorized, with a distinct continuation to the company making the departure of the benefits of the act, with a limitation of the amount of subsidy to the original donation.

The act of 1866 restricts the Kansas company from the unlimited choice of the place of junction permitted in the language here quoted, to a point not more than fifty miles west of the meridian of Denver. The act passed March 3, 1869, (15 Stat., 324,) is understood to extend to this company a land grant to the whole of the lengthened route, leaving the subsidy of bonds still limited by the distance from its starting point to the initial point of the main trunk on the one hundredth meridian.

Putting all this legislation together, we see that Congress authorized this company to deviate from the route originally

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contemplated, first, by a general provision applicable to all the branch roads; and, secondly, by a provision applicable to this road only. But the identity of the road in the relation of the Government to it is still preserved. A departure from the route first contemplated works no forfeiture of the benefits granted. Though the land subsidy is increased, the bond subsidy is the same that it would have been if the variation in the route had not been made.

The 16th section of the act of 1864 appears to me to intend no duplication or other increase of subsidies from the Government when it authorizes one company, upon the completion of its road, to build the road which was expected to have been built by a connecting company, and to get the subsidies which the connecting company would have got if it had done its duty. The intention was to give the former company only what the latter would have lost. The Kansas company loses nothing. It receives lands for the whole length of its route; it receives bonds for the length of its route as originally prescribed, and yet, on account of its supposed default, the Central Branch company claims lands and bonds for a large part of the same distance. This claim gives to a variation permitted by Congress in the route of one of the companies the effect of doubling the public subsidies for the distance between the present end of the Central Branch road and the initial point of the main trunk.

I find in the acts of Congress a grant of no more than one subsidy for that space, and the Kansas company being entitled to that subsidy, no other company can receive the same as its substitute. There can be no substitute for what still exists, and it is certain that the Kansas company has an existing right to the amount of lands and bonds given by the acts of 1862 and 1864 for the distance for which the subsidy is claimed by the Central Branch company.

Suppose that the Kansas company, under the permission of the 9th section of the act of 1864, had chosen to carry its road to the main trunk at a point ten miles west of the initial point on the one hundredth meridian, would the Central Branch company have had a right to have carried its road to the initial point, and to subject the Government to the burden of aiding with these large subsidies two roads almost

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parallel and only ten miles apart? Surely not. And should the Kansas company have chosen its point of junction with the main trunk at the distance of fifty, one hundred, or two hundred miles, or at the meridian of Denver, or fifty miles west thereof, at which one of the selections would the identity of its subsidy have been so lost as to admit the Central Branch road to come in as its substitute?

The 16th section of the act of 1864 gives to the defaulting company, under certain circumstances, a right to recover its road which has been lost by default, by paying to the substituted company the latter's necessary outlay in constructing the road which originally belonged to the former. If the Central Branch company should succeed in the present claim, and extend its road toward the initial point on the one hundredth meridian, could not the Kansas company recover this extension by paying for the outlay on it, and thus own two subsidized roads, one to the junction beyond Denver, and the other to the initial point? This is certainly more than Congress intended to give even to that favored company.

The same section further provides that "all the rights, benefits, and privileges which shall be acquired, possessed, or exercised pursuant to this section shall be to that extent an abatement of the rights, benefits, and privileges hereinbefore granted to such other company." Applied to the present case, this provision means that no benefits can be acquired by the Central Branch company when taking the place of the Kansas company, except such as are an abatement of the benefits given in the act to the latter company. The benefit now claimed by the Central Branch company is a subsidy for the distance from the place of its intended junction with the Kansas road (whenever that junction might be fixed) to the initial point on the one hundredth meridian. The Kansas company still keeps this benefit, and keeps it lawfully. There is no "abatement" for the other company to acquire.

It has been impressively urged upon me that this construction is inadmissible, because it imputes to Congress a violation of the public faith pledged to the Central Branch company in the acts of 1862 and 1864. The bounty tendered in those acts was qualified in both with a reservation to Congress of a right to alter, amend, or repeal at any time. Faith-

Tax on Dividends Accruing to a State.

is never broken by the recall of a revocable grant. In permitting to the Kansas company a departure from the original route, Congress may have disappointed the Central Branch company, but Congress alone is competent to afford relief. The head of a Department should not dispose of public lands or issue the bonds of the nation in aid of any enterprise, however meritorious, without an unequivocal direction from the legislature.

Not finding such a direction in this case, I am of opinion that you should reject the claim in question.

I believe that these views cover the ground of all your questions, and therefore do not answer them in detail.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. C. DELANO,

Secretary of the Interior.

TAX ON DIVIDENDS ACCRUING TO A STATE.

Internal-revenue tax paid on dividends accruing to the State of Massachusetts as a stockholder in the Boston and Albany Railroad, from January, 1863, to July, 1869, inclusive, held (upon the authority of opinions of former Attorneys-General cited) to have been erroneously collected.

The Commissioner of Internal Revenue is authorized, not obliged, to refund taxes erroneously collected; but he should refund in all such cases, except where the fault of the tax-payer, or his waiver of his rights, or his long acquiescence, or other sufficient circumstances, discredit the claim.

DEPARTMENT OF JUSTICE,

June 3, 1871.

SIR: Your letter of the 6th of October last requests my opinion upon the question whether the State of Massachusetts is entitled to a return of the internal-revenue tax paid on dividends accruing to the State as a stockholder in the railroad now known as the Boston and Albany Railroad.

From January, 1863, to July, 1869, inclusive, the tax was regularly paid on the whole amount of the dividends semi-annually declared by the company. The officers of the company regularly reported the sum total without distinguishing

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between the shares of the State and the shares of other owners. No notice that the State was a stockholder seems to have been given to the officers of the internal revenue, and no objection to the tax seems to have been made at the time. The papers transmitted to me show no effort on the part of the State to recall the moneys thus paid until the year 1869 or 1870.

I do not understand the law to compel the Commissioner of Internal Revenue to refund all taxes which he may judge to have been erroneously collected. He is authorized, not obliged, to refund. But, representing a Government that abhors injustice, the Commissioner should refund in all cases of illegal collection, except where the fault of the tax-payer, or his waiver of his rights, or his long acquiescence, or other sufficient circumstances, discredit the claim. Whether such circumstances exist in this case is for the consideration of the Commissioner.

The tax was paid under section 122 of the act of June 30, 1864, (13 Stat., 284,) and similar provisions in other statutes. This section has been often considered by my predecessors. The reasoning of Mr. Stanbery, (12 Opins., 277;) of Mr. Browning, (*ibid.*, 376;) and of Mr. Hoar, in an opinion of June 2, 1869, (*ante*, p. 67,) though not directly upon the present point, tends to the conclusion that the dividends upon the State's stock were not subject to this tax. And this is the conclusion of Mr. Browning in a case exactly like the present—that of the Hartford National Bank, (12 Opins., 402.) Controlled by these authorities, I think that you should assume that the tax in question was not legally collected.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. GEORGE S. BOUTWELL,

Secretary of the Treasury.

RELATIVE RANK OF ARMY PAYMASTERS.

The period of service during which those paymasters in the Army who were selected and appointed pursuant to the provisions of the act of July 26, 1866, from the "additional paymasters" created under the 25th section of the act of July 5, 1838, served as such "additional paymas-

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ters," should not be taken into account in determining their relative rank as between themselves and other paymasters in the Army whose commissions are of prior date to theirs.

The second proviso to the 13th section of the act of March 3, 1847, by which length of service in the Pay Department, and not date of commission therein, was made to determine relative rank among paymasters, has been superseded by the 1st section of the act of March 2, 1867, which is expressly given a retrospective operation upon all appointments theretofore made under the act of July 26, 1866.

Except as between such as have the same date of appointment and commission, the act of March 2, 1867, leaves the matter of relative rank to be regulated solely according to the dates of the commissions under which those officers are at the time acting.

But where they have the same date of appointment and commission the matter is to be determined by length of service, computed according to the provisions of the last-mentioned act.

DEPARTMENT OF JUSTICE,

June 13, 1871.

SIR: I have carefully examined the subject presented in the papers which accompanied your letter to the Attorney-General, of the 28th of October last, touching the relative rank of certain officers in the Pay Department of the Army.

It seems that during the late rebellion in the Southern States, the officers who have presented the question, herein-after stated, were appointed as "additional paymasters" under the 25th section of the act of July 5, 1838, (5 Stat., 259,) and served continuously from the date of their respective appointments until the re-organization of the Pay Department of the Army, under the 18th section of the act of July 26, 1866, (14 Stat., 335,) fixing the military peace establishment of the United States, when, pursuant to the provisions of that section, they were selected to make up, in part, the complement of paymasters thereby authorized for that department, and were commissioned as such.

By the second proviso to the 13th section of the act of March 3, 1847, (9 Stat., 185,) regulating the rank of officers in the Pay Department, it is declared, "That the right to command in the Pay Department, between officers having the same rank, shall be in favor of the oldest in service *in the department*, without regard to the date of commission under which they may be acting at the time;" and the question is, whether, in determining the relative rank or right to com-

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mand, as between those paymasters who were selected and commissioned as aforesaid, and other paymasters in the Army whose commissions are of prior date, the period during which the former served as "additional paymasters" should be taken into account. The proper determination of this question depends upon the answer to be given to two others of a preliminary character, viz:

1. Whether the provision of the act of 1847, quoted above is still in force.
2. Whether officers serving as "additional paymasters" by appointment under the act of 1838 are officers of the Pay Department, or "in service in the department," within the meaning of that provision.

By the act of May 15, 1820, (3 Stat., 582,) the term of office for which paymasters in the Army were authorized to be appointed was limited to four years. This act remained in force when the act of 1847, above cited, became a law. It is understood to have been the practice of the Government to re-appoint and recommission officers of the Pay Department of the Army upon the expiration of their respective terms of service. Under the operation of this rule, the senior officer of one day would often become the junior of the following day. To obviate this inconvenience, Congress established the rule that length of service in the Pay Department, and *not* the date of commission, should regulate the relative rank of officers in that department. The act of March 2, 1849, (9 Stat., 350,) abolished the term of service by making the tenure of officers in the Pay Department the same as that of the "heads of other disbursing departments of the Army." Whether or not the provision of the act of 1847, referred to above, became obsolete upon the passage of the act of March 2, 1849, is a question which need not now be determined, in view of the conclusion hereinafter reached. It is certain, however, that the provision of the act of 1847 lost much of its practical importance upon the passage of the act of 1849, since length of service would thenceforth be found generally to coincide with the date of the commission.

The act of the 28th of July, 1866, (14 Stat., 332,) entitled "An act to increase and fix the military peace establishment of the United States," changes the organization of the Army in many essential particulars, and is, in fact, an act providing

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for the re-organization of the Army. The 18th section of that act, after authorizing the appointment of one Paymaster-General, two assistant paymasters-general, and two deputy paymasters-general, provides for "sixty paymasters, with the rank, pay, and emoluments of majors of cavalry, to be selected from persons who have served as additional paymasters," but is silent upon the relative rank of these officers.

No further legislation on the subject of relative rank is to be found in the statutes until we come down to the 1st section of the act of March 2, 1867, (14 Stat., 434.) By that section it is declared: "That in computing the length of service of any officer of the Army, in order to determine what allowance and payment of additional or longevity rations he is entitled to, *and also in fixing the relative rank to be given to an officer as between himself and others having the same grade and date of appointment and commission, there shall be taken into account and credited to such officer whatever time he may have actually served, whether continuously or at different periods, as a commissioned officer of the United States, either in the Regular Army, or since the nineteenth day of April, eighteen hundred and sixty-one, in the volunteer service, either under appointment or commission from the governor of a State, or from the President of the United States;* and the provision herein contained as to relative rank shall apply to all appointments that have already been made under the act to fix the military peace establishment of the United States, approved July 28, 1866." This provision as to relative rank is of general application, and includes officers in the Pay Department as well as all other officers in the military service. By the last clause of the section there is given to it a retrospective operation upon all appointments theretofore made under the act of 1866. It is difficult to resist the conclusion that this act was designed to supersede all previous regulations on the same subject in cases where length of service constituted an element in determining the relative rank of officers. It is true the provision of the act of 1867 is, in terms, restricted to officers "having the same grade and date of appointment and commission," but it is also true that under this restriction it stands in conflict with the second proviso to the 13th section of the act of 1847. For example, suppose that under the ac of 1866, two officers had been appointed and com-

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missioned as paymasters on the same day, one of whom had previously served as an "additional paymaster" for two years, and the other as a "commissioned officer" in the line for two years, and as an "additional paymaster" for one year. Assuming, for the purposes of this illustration, that "additional paymasters" are officers in the service of the Pay Department within the meaning of the act of 1847, then, according to the provision of that act concerning relative rank, the first-mentioned officer would have the "right to command" as between himself and the other, because he was "the oldest in service in the department;" on the other hand, according to the provision of the act of 1867 concerning the same subject, the last-mentioned officer would have the "right to command," because he was longest in the military service as a "commissioned officer of the United States," though youngest in the service of the Pay Department. To the extent of this conflict in regard to officers "having the same grade and date of appointment and commission," certainly the prior statutory provision must yield to the subsequent one, and I am of opinion that it was the intention of the legislature, in adopting the latter, to establish a new and different rule for regulating relative rank, and to sweep the former statute away altogether. Otherwise this remarkable consequence would be rendered possible—that an officer with a junior commission might be enabled to take precedence over an officer of the same grade with a senior commission, which he could not do if their commissions were of the same date. Thus, in the illustration above given, if the commission of the first-mentioned officer had been one day, or one month, or any period less than a year later than that of the other, the former (on the assumption that the law of 1847 is still applicable as between officers of the Pay Department having the same grade, but not the same date of appointment and commission) would have been entitled to the "right to command;" which, as we have seen, he could not claim under existing legislation upon a commission bearing the same date as that of the other officer.

It will be observed, then, that to hold that the act of 1867 does not abrogate, but modifies only, the second proviso to the 13th section of the act of 1847, would lead to the most absurd consequences, and would result in defeating the mani-

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fest spirit of each of said acts. It must be presumed that Congress meant to avoid this absurdity, and accordingly designed the act of 1867 to operate by way of substitution for, rather than as a modification of, the provision of the act of 1847 under consideration, and to take the place of all regulations then existing, whether general or special, concerning relative rank, where a retrospect is had to length of service in determining that rank. From this point of view it becomes needless to enter upon the inquiry whether "additional paymasters" are officers of the Pay Department within the meaning of the act of 1847.

Without pursuing the subject into further detail, I may state that, upon the general question presented, I am of opinion that the period during which the paymasters referred to served as "additional paymasters" should not be taken into account in determining their relative rank as between themselves and other paymasters in the Army whose commissions are of prior date to theirs; but that (except as between such as have the same date of appointment and commission) the act of 1867, which, as I think, supersedes the act of 1847, leaves the matter to be regulated solely according to the dates of the commissions under which those officers are at the time acting.

The papers mentioned in your communication are herewith returned.

Very respectfully, your obedient servant,

B. H. BRISTOW,

Solicitor-General and Acting Attorney-General.

Hon. W. W. BELKNAP,

Secretary of War.

MILWAUKEE AND SAINT PAUL RAILWAY COMPANY.

The railroad between the towns of McGregor and Colmar, in Iowa, formerly owned by the McGregor Western Railroad Company, and now forming a part of the line of the Milwaukee and Saint Paul Railway Company, is not a "land-grant" road.

DEPARTMENT OF JUSTICE,

June 14, 1871.

SIR: I have considered the question submitted to the At-

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torney-General in your letters of July 12, 1870, and May 18, 1871, as to whether the railroad between the towns McGregor and Colmar, Iowa, which forms a part of the line of the *Milwaukee and Saint Paul Railway Company*, is or is not a "land-grant" road. This question, it seems, has arisen in connection with certain transportation performed by that company for the Quartermaster's Department over the railroad mentioned—the officers of the Department claiming the usual abatement of 33½ per cent. from the regular rates, in respect of such transportation, on the ground that said road is, as they assume, a land-grant road; while the agents of the company deny that the road is a land-grant road, and decline to allow the abatement claimed. From the papers submitted with your letters, and from other sources of information within immediate reach, I gather the following facts:

By act of Congress of May 12, 1864, (13 Stat., 72,) a grant of public lands was made to the State of Iowa, "for the use and benefit of the *McGregor Western Railroad Company*, for the purpose of aiding in the construction of a railroad from McGregor, in that State, westward by the most practicable route on or near the 43d parallel, until it should intersect a railroad from Sioux City to the Minnesota State line."

The 4th section of the act contains a proviso to the effect that if the said company or its assigns shall fail to complete at least twenty miles of its said road during each and every year from the date of its acceptance of the grant, then the State may resume the grant, and so dispose of the same as to secure the completion of a road on said line, &c. The grant was accepted on the part of the State, by an act of the legislature thereof dated April 20, 1866, upon the terms, conditions, and restrictions imposed by Congress.

On the 27th of February, 1868, the State legislature passed an act entitled "An act to resume all the lands and rights conferred upon the *McGregor Western Railroad Company* by or under an act of Congress approved May 12, A. D. 1864." This act (after reciting in a preamble the grant to the State hereinbefore mentioned, the proviso in the 4th section of the act of Congress to which reference is above made, and also declaring that said company has wholly failed to build said railroad as therein required, and to perform the conditions of

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said grant, and has forfeited all rights to the benefits of said grant) enacts "*That all lands and all rights to said lands, granted or intended to be granted to the McGregor Western Railroad Company by said act, be, and the same are hereby, absolutely and entirely resumed by the State of Iowa, and that the same be, and are, as fully and absolutely vested in said State as if the same had never been granted to said railroad company.*"

And shortly afterward, namely, on the 31st of March, 1868, the same legislature passed an act making a new disposition of the grant, conferring it upon another company called the *McGregor and Sioux City Railway Company*. This act provides "*That all the lands, rights, and privileges that are granted to the State of Iowa by an act of Congress approved May 12, 1864, for the purpose of aiding in the construction of a railroad from, &c., until it should intersect the proposed railroad running from Sioux City to the Minnesota State line, &c., are hereby granted and conferred to and upon the McGregor and Sioux City Railway Company.*" The act furthermore provides that this grant is made upon the following among other conditions, viz: "*That said railway company shall have constructed and in running order a line of railway as required by the provisions of the act of Congress making said grant to the State, and of this act,*" &c. It also contains a provision that "*this act shall not be so construed as to grant to said railway company, or any person or persons whatever, any of said lands for any railroad heretofore built;*" and it requires, as a further condition of the grant, that the said railway company shall procure and file with the secretary of state (of Iowa) a full, absolute, legal, and effectual waiver, release, and surrender of all claim, right, or interest, or pretended claim, right or interest of the *McGregor Western Railroad Company*, its successors or assigns, in or to any of the lands granted to the State by act of Congress approved May 12, A. D. 1864; which claim, right, or interest arises out of or is on account of any railroad already constructed.

On the 28th of April, 1868, the board of directors of the *McGregor Western Railroad Company* adopted a resolution authorizing certain officers of that company "to make, execute, and deliver to the *McGregor and Sioux City Railway*

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Company a full, absolute, legal, and effectual waiver, release, and surrender of all claim, right, or interest, or pretended claim, right, or interest," as aforesaid; and thereupon the officers of the former company referred to executed an instrument containing a full, absolute, legal, and effectual waiver, release, and surrender of all said claims as above described to the *McGregor and Sioux City Railway Company*, which was filed by the latter company in accordance with the requirement of the act of the State legislature already mentioned. I may observe here that the *McGregor and Sioux City Railway Company* has since changed its name to the *McGregor and Missouri River Railway Company*, and is at present known by the latter designation. The act of Congress making the grant to the State of Iowa provides (see 4th section) that when the governor of that State shall certify to the Secretary of the Interior that any section of ten consecutive miles of road is completed in a good, substantial, and workman-like manner as a first-class railroad, then the Secretary shall issue to the State patents for one hundred sections of land for the benefit of the road having completed the ten consecutive miles; and so on for each additional section of ten consecutive miles, until the entire road is completed. It appears that on the 5th of December, 1870, the governor certified to the Secretary that certain maps annexed to his certificate "constitute a correct delineation of the completed part of the railroad contemplated in said act of Congress, &c.; that said road is built in a good, substantial, workman-like manner, &c.; and said road is completed to Algoria, in Kossuth County, a distance of 182 $\frac{2}{100}$ by the line of said road from the city of McGregor." The maps mentioned describe the road thus completed as that of the *McGregor and Missouri River Railway Company*, formerly called the *McGregor and Sioux City Railway Company*, and they include as part thereof the road from McGregor to Colmar.

Besides the certificate of the governor, there is also filed with the Secretary an affidavit purporting to have been given by the president of the *McGregor and Missouri River Railway Company* on the 30th of December, 1869, stating that "their road is completed and equipped from the city of McGregor to the village of Mason City," &c. Now, I find it stated in the

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papers submitted, that before the resumption of the grant by the State of Iowa, as aforesaid, from the *McGregor Western Railway Company*, this company had already built the road undertaken thereby from McGregor as far as Colmar, and sold it to the *Milwaukee and Saint Paul Railway Company*, by which it is understood to be still owned and managed, forming a part of the line or route of the latter company between Saint Paul and Milwaukee; that neither of those companies has ever had the benefit of the grant mentioned, directly or indirectly; and that the *McGregor and Sioux City Railway Company*, now called the *McGregor and Missouri River Railway Company*, never had anything to do with, or any interest in, the road from McGregor to Colmar. - This road, as it would seem, is not locally distinct from the road between those points which is described on the aforesaid maps as forming a part of the completed portion of the *McGregor and Missouri River Railway Company*.

Taking the foregoing to present a correct statement of all the material facts of the case, I incline to the view that the railroad between McGregor and Colmar, Iowa, forming part of the line of the Milwaukee and Saint Paul Railway Company, is not a land-grant road.

In arriving at this conclusion, I assume that the act of the Iowa legislature resuming the grant from the McGregor Western Railway Company after it had completed its road to Colmar was valid and effectual for that purpose, but that it effected nothing beyond the mere exclusion of the benefit of the grant, leaving the company in the enjoyment of its franchise, and it or its assignee in the possession and ownership of the road as before. If this is so, and neither that company nor its assignee afterward became entitled to participate in the benefits of the grant with respect to this piece of road, I am unable to perceive in what way the same can be regarded as a land-grant road. There is nothing in the subsequent action of the State of Iowa, or of the McGregor Western Railway Company, so far as I can discover, which shows that the latter, or its assignee, ever became so entitled.

The State legislature, after resuming the grant as aforesaid, conferred it upon the McGregor and Sioux City Railway Company, but in doing so expressly excluded therefrom "any

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railroad theretofore built," which necessarily cut out the road in question. Not only this, but in the act conferring the grant upon the last-mentioned company the precaution was taken to require it to file, as one of the conditions upon which the grant was conferred, "a full, absolute, legal, and effectual *waiver, release, and surrender* of all claim, right, or interest, or pretended claim, right, or interest," of the former company in or to any of the lands granted by Congress, "which claim, right, or interest arises out of or is on account of any railroad already constructed." So that neither of those companies could, by the terms or under the operation of this act, claim any benefit from the grant in respect of the road then already built, which, as it appears, included the road between McGregor and Colmar.

Much of the difficulty surrounding the subject under consideration has, perhaps, grown out of the fact that the railroad between McGregor and Colmar is on the line of the route mentioned in the act of Congress cited above; that it is described as forming part of the road of the *McGregor and Missouri River Railway Company* on certain maps which, the governor of Iowa certifies, "constitute a correct delineation of the completed part of the railroad *contemplated* in said act of Congress;" and that the president of the *McGregor and Missouri River Railway Company* has made an affidavit in which he states that their road is completed and equipped "from the city of McGregor to the village of Mason City," which is a point westward of Colmar.

Were this a case between *that company* and the Government, there might be some foundation here for a different view from that above expressed. But as the matter now stands, in the light of the information before me, I see no escape from the conclusion already indicated.

Very respectfully,

B. H. BRISTOW,

Solicitor-General and Acting Attorney-General.

Hon. Wm. W. BELKNAP,

Secretary of War.

Habeas Corpus.

HABEAS CORPUS.]

An officer of the Army, in Kansas, having arrested three men at the request of the United States marshal, charged with assaulting the latter and obstructing the execution of process by him, while the parties so arrested were in the officer's custody a writ of *habeas corpus* was issued by the probate judge of the county, commanding the officer to bring before him the bodies of the prisoners together with the cause of their detention; the officer made a proper return to the writ, but without bringing up the prisoners, whom he turned over to the marshal; whereupon the judge issued an attachment against the officer:—

Held (on the assumption that the marshal made the arrest under proper process or warrant of a United States court or commissioner, or for an offense committed within his own view, and that the officer was duly summoned by the marshal to assist in making the arrest and holding the prisoners) that it was the duty of the officer to obey the writ of *habeas corpus* no further than to make a respectful return of the facts of the case, showing that he held the prisoners under authority of the United States, and that the attachment was void and need not have been obeyed.

DEPARTMENT OF JUSTICE,
June 19, 1871.

SIR: From your letter of the 15th instant, and the accompanying copy of telegraphic correspondence between Brevet Major-General John Pope and Assistant Adjutant-General Whipple, I learn that on the 12th instant, at Ellsworth, in the State of Kansas, Captain Snyder, of the United States Army, at the request of the United States marshal for the district of Kansas, arrested three men on the charge of obstructing and opposing the said marshal while attempting to execute a process of a court of the United States, and assaulting him while so engaged, and that while the parties thus arrested were in the custody of Captain Snyder, under the direction of the marshal, the probate judge of Ellsworth County issued a writ of *habeas corpus* commanding the said Snyder to bring before the said judge the bodies of said prisoners, together with the cause of their detention. It is stated that the "proper return in writing" was made to this writ, and that the prisoners were not taken before said judge, but were afterward turned over to the United States marshal by

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Captain Snyder, whereupon the probate judge issued process of attachment against Captain Snyder. Upon this state of facts General Pope desires to be informed whether or not this process shall be obeyed. It further appears, from the correspondence before me, that on the 15th instant General Whipple advised General Pope that the process need not be obeyed.

You are pleased to state that these facts are submitted to the Attorney-General for such suggestions as he may have to offer, from which I conclude that you desire the opinion of this Department touching the legality of the action of Captain Snyder, and the instructions given by General Pope.

Upon the general question thus presented, I cannot state the law more clearly than by quoting the language of Chief Justice Taney, delivering the opinion of the Supreme Court in the case of *Ableman vs. Booth*, (21 Howard, 506.) In discussing the asserted power of a State judge to discharge a prisoner in the custody of a United States marshal on a charge of violating a law of the United States, the learned Chief Justice used this language:

"We do not question the authority of State court, or judge, who is authorized by the laws of the State to issue the writ of *habeas corpus*, to issue it in any case where the party is imprisoned within its territorial limits, provided it does not appear, when the application is made, that the person imprisoned is in custody under the authority of the United States. The court, or judge, has a right to inquire, in this mode of proceeding, for what cause and by what authority the prisoner is confined within the territorial limits of the State sovereignty. And it is the duty of the marshal, or other person having the custody of the prisoner, to make known to the judge, or court, by a proper return, the authority by which he holds him in custody. This right to inquire by process of *habeas corpus*, and the duty of the officer to make a return, grows necessarily out of the complex character of our Government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action prescribed by the Constitution of the United States, independent of the other. But after the return is made, and the State judge, or court, judicially apprised that the party

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is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus*, nor any other process issued under State authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress. And, although, as we have said, it is the duty of the marshal, or other person holding him, to make known, by a proper return, the authority under which he detains him, it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government. And, consequently, it is his duty not to take the prisoner, nor suffer him to be taken, before a State judge or court upon a *habeas corpus* issued under State authority. No State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him or to require him to be brought before them. And if the authority of a State, in the form of judicial process or otherwise, should attempt to control the marshal or other authorized officer or agent of the United States in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued, and an attempt to enforce it beyond these boundaries is nothing less than lawless violence."

It is impossible to misunderstand the meaning of the court in this case, or to resist the clear and forcible logic of the eminent judge who delivered the opinion. Mr. Justice Nelson, in his charge to the grand jury, in the circuit court of the United States for the southern district of New York, in April, 1851, referring to this subject, used the following language:

Habeas Corpus.

"It is proper to say, in order to guard against misconstruction, that I do not claim that the mere fact of the commitment or detainer of a prisoner by an officer of the Federal Government bars the issuing of this writ or the exercise of power under it. Far from that. Those officers may be guilty of illegal restraints of the liberty of the citizen the same as others. The right of the State authorities to inquire into such restraint is not doubted; and it is the duty of the officer to obey by making a return. All that is claimed or contended for is, that when it is shown that the commitment or detainer is under the Constitution, or a law of the United States, or a treaty, the power of the State authority is at an end, and any further proceeding under the writ is *coram non judice* and void. In such a case, that is, when the prisoner is in fact held under process issued from a Federal tribunal under the Constitution, or a law of the United States, or a treaty, it is the duty of the officer not to give him up, or allow him to pass from his hands in any stage of the proceedings. He should stand upon his process and authority, and if resisted, maintain them with all the powers conferred upon him for that purpose."

Opinions to the same effect have been delivered by several of the judges of the United States, among the most able and notable of which is that of Judge Ballard, district judge of the United States for the district of Kentucky, in the case of *Ex. Rel. Ferdinand vs. Fowler*, reported in 2 American Law Times Reports, p. 4.

It seems quite clear, then, that when a State judge is given to understand that the prisoner is held under the authority of the United States, his jurisdiction is at an end, and all further proceeding on his part to enforce the surrender of the prisoner is, in the language of Mr. Justice Nelson, "*coram non judice* and void." It is not necessary that it shall be proved before the State judge that the party is in custody under lawful authority of the United States, for upon such proof being made, no judge, not even a judge of a court of the United States, could discharge the prisoner. On the contrary, when it is made to appear by the return to the writ that the prisoner is held under authority of the United States, it is then shown that he is within the jurisdiction of a sover-

Habeas Corpus.

eignty which, for all the purposes of the case, is wholly foreign to that represented by the State judge, and that the prisoner is entirely beyond his jurisdiction. Whether or not such return might be traversed, and an issue of fact made thereon before the State judge by the party on whose application the writ is issued, is a question which need not now be considered, for the reason that the papers before me do not show that any effort was made to controvert the facts stated in the return.

I am not distinctly advised by the papers accompanying your letter as to the manner in which Captain Snyder was called upon by the marshal to assist in making the arrest; but the facts stated in the correspondence show that the prisoners had committed an offense against the United States, punishable under the 22d section of the act of Congress approved April 30, 1790, (1 Stat., 115;) and assuming, as I must do, from the facts before me, that the United States marshal made the arrest under a proper process or warrant of a court or commissioner of the United States, or for an offense committed within his own view, and that Captain Snyder was duly and regularly summoned by the marshal to assist in making the arrest and holding the prisoners, I am clearly of opinion that it was his duty to obey the writ of *habeas corpus* issued by the probate judge of the county of Ellsworth no further than to make a respectful return of the facts of the case, showing that he held the prisoners under authority of the United States; and that any further process issued by the said judge in aid of the writ of *habeas corpus* was void, and therefore need not have been obeyed by the marshal or his posse.

From this view of the subject, it follows that the instruction given by the Assistant Adjutant-General of the Army is correct.

Very respectfully, your obedient servant,
B. H. BRISTOW,
Solicitor-General, and Acting Attorney-General.
Hon. Wm. W. BELKNAP,
Secretary of War.

NOTE.—Since the foregoing opinion was given, it has been declared by the Supreme Court of the United States, in *Tarble's Case*, (13 Wall., 397,) that a court or judicial officer of a State has no jurisdiction to issue a writ

Case of R. H. McGoan.

of *habeas corpus*, or to continue proceedings under the writ when issued, for the discharge of a person detained under the authority, or claim and color of authority, of the United States, by an officer of the latter; and that if a party thus detained be illegally imprisoned, it is for the courts or judicial officers of the United States, and those courts and officers alone, to grant him release. That case arose upon a *habeas corpus* issued by a court commissioner of the State of Wisconsin to a recruiting officer of the United States Army, to bring before the former a person who had enlisted as a soldier, and whose discharge was sought on the ground that he was a minor under the age of eighteen at the time of enlistment, and that he enlisted without the consent of his father. The Supreme Court held that the commissioner was without jurisdiction to issue the writ, it appearing upon the application presented to him therefor that the prisoner was detained by an officer of the United States, under claim and color of the authority of the United States. "State judges and State courts," it is observed in the opinion pronounced, (*ibid.*, p. 409,) "authorized by laws of their States to issue writs of *habeas corpus*, have undoubtedly a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, unless it appear upon his application that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that Government. If such facts appear upon the application, the writ should be refused. If it do not appear, the judge or court issuing the writ has a right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the State; and it is the duty of the marshal, or other officer having the custody of the prisoner, to give, by a proper return, information in this respect. His return should be sufficient, in its detail of facts, to show distinctly that the imprisonment is under the authority, or claim and color of the authority, of the United States, and to exclude the suspicion of imposition or oppression on his part. And the process or orders under which the prisoner is held should be produced with the return and submitted to inspection, in order that the court or judge issuing the writ may see that the prisoner is held by the officer, in good faith, under the authority, or claim and color of authority, of the United States, and not under the mere pretense of having such authority."

CASE OF R. H. McGOON.

The principle that the final decision of a matter before the head of a Department is binding upon his successor in the same Department, under certain well-defined exceptions, has been so frequently declared that it is now entitled to be regarded as a settled rule of administrative law.

Where a patent for public land has once issued, it cannot afterward be canceled or annulled by the mere act of the Department; the intervention of a court is necessary for that purpose.

A second patent should not issue for the same land so long as the prior patent remains unrevoked by a judicial tribunal.

Case of R. H. McGoon.

DEPARTMENT OF JUSTICE,

June 20, 1871.

SIR : The case submitted in your letter of the 17th instant is as follows: "On the 18th of July, 1835, the S. W. $\frac{1}{4}$ sec. 10, T. 1 N., R. 2 E., was entered at the Mineral Point, Wisconsin, land-office by Jesse Wilson Shull and Lewis E. Vanmatre. On the same day Vanmatre also entered the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of the same section. On the same day both tracts were assigned by the purchasers to R. H. McGoon. On the 3d of December, 1835, both entries were vacated by the General Land-Office on the ground that the tracts were mineral lands. On the 29th of May, 1847, these lands were sold to William Hempstead and William M. Hinman, to whom patents therefor have since been issued. McGoon alleges that the entries were improperly canceled, and has made application to the Department to open the matter."

You ask whether, under the circumstances, you have the authority to grant this application.

It appears, from the papers which accompanied your letter, that a similar application was made by the same party in 1852 to the Secretary of the Interior, who in an opinion dated the 19th of October of that year, evincing a careful and thorough examination of the case, denied the application and affirmed the former action of the Department. This circumstance, it is presumed, was intended to be considered along with the others stated. In the opinion mentioned, the Secretary observes: "If my opinion of the merits of McGoon's title had been different, I do not perceive how, in the present aspect of the case, it would be competent for me to grant the relief asked for. The patents have already issued for the land, and I am not aware of any authority vested in me by law, either to rescind those patents or to issue new ones for the same land."

The principle has been so frequently declared that the final decision of a matter before the head of a Department is binding upon his successor in the same Department, under certain well-defined exceptions, that it is now entitled to be regarded as a settled rule of administrative law. (See on this subject *United States vs. Bank of the Metropolis*, 15

Case of R. H. McGeon.

Pet., 401; Opinion of Mr. Wirt, 2 Opins., 9; of Mr. Taney, 2 Opins., 464; of Mr. Nelson, 4 Opins., 341; of Mr. Toucey, 5 Opins., 29; of Mr. Johnson, 5 Opins., 123; of Mr. Black, 9 Opins., 101, 301-2, 387; of Mr. Stanbery, 12 Opins., 358; of Mr. Hoar, dated April 26, 1869, in relation to the case of Admiral Goldsborough, ante p. 33, and another, dated May 5, 1870, in relation to the claim of George Chorpenning, ante p. 226, all of which authorities are cited and approved in a recent opinion addressed to you by the Attorney-General, dated March 7, 1871, in the case of R. C. Sargent and others against the Western Pacific Railroad Company.) None of the exceptions referred to are shown to exist in the case submitted; and thus, as it seems to me, the rule just stated being properly applicable here, under its operation you clearly have no authority to disturb the decision of your predecessor or re-open the case finally determined by him.

There is another consideration, of a practical character, which is briefly adverted to in the opinion of your predecessor, and which should not be overlooked. Patents have long since issued to other parties for the lands to which the vacated entries relate. These patents could not be canceled or annulled by the mere act of the Department. That is a judicial act, and requires the intervention of a court, (*United States vs. Stone*, 2 Wall., 535.) A second patent should not issue for the same land so long as the prior patent remains unrevoked by a judicial tribunal. But how far a court of competent jurisdiction would inquire into the validity of those patents under the circumstances of this case, in a proceeding instituted for the purpose of canceling them, is a question which has not been submitted to me, and I express no opinion thereon.

I return herewith the papers transmitted to me with your letter.

I have the honor to be, very respectfully, your obedient servant,

B. H. BRISTOW,

Solicitor-General, and Acting Attorney-General.

Hon. COLUMBUS DELANO,

Secretary of the Interior.

Effect of Disapproval of Court-Martial Proceeding.

EFFECT OF DISAPPROVAL OF COURT-MARTIAL PROCEEDING.

Where a soldier was tried by a court-martial for theft and desertion, and, having been convicted of both charges, was sentenced by the court; but the proceedings, findings, and sentence were afterward disapproved by the reviewing officer, (the commanding general of the military department,) and the prisoner ordered to be released from confinement and restored to duty: *Held* that the action of the reviewing officer was in effect an acquittal by the court; that the accused is, in contemplation of law, innocent of the charges mentioned; and that there is no authority for withholding his pay on account of the alleged desertion.

DEPARTMENT OF JUSTICE,
June 21, 1871.

SIR: I have the honor to acknowledge the receipt of your letter of the 12th instant, requesting the opinion of this Department upon the question presented in the case of private Edward Johnson, Company L, 2d Cavalry. The facts in the case appear to be as follows:

Johnson, being a soldier in the Army, was arraigned and tried before a general court-martial on charges of desertion and theft, upon both of which he was found guilty by the court, and sentenced to "forfeit all pay and allowances that are now, or may become due him, except the just dues of the laundress, to be dishonorably discharged from the service of the United States, and to be confined at hard labor for one year in such penitentiary as the commanding general of the department of Dakota may direct." The proceedings, findings, and sentence in this case were submitted to the commanding general of the department, Major-General Hancock, by whom they were disapproved, for the alleged reason that the court had allowed so much of the examination of the only witness for the prosecution to be conducted by means of leading questions as to destroy the value of the testimony, and the prisoner was ordered to be released from confinement and restored to duty.

Upon this state of facts you are pleased to inform this Department that the opinions of officers of the War Department are in conflict upon the question whether Johnson, though acquitted by action of the reviewing officer on account

Finn's Point, New Jersey.

of the improper manner in which the testimony for the prosecution was elicited, is not still proven to be a deserter, and, hence, not entitled to pay for the time mentioned.

It is quite clear that the charge of desertion—the first charge upon which the prisoner was tried—includes the lesser offense of absence without leave, and upon well-known rules of criminal procedure, applicable in trials before court-martials, the prisoner in this case might have been convicted of the lesser offense. He was actually on trial on the charge of desertion, and for every lesser offense included within that charge, and it necessarily follows that his acquittal upon that charge would have operated as an acquittal of any offense of which he might have been found guilty under the charge.

The inquiry then remains, what is the effect of the disapproval of the sentence and the order thereupon by the reviewing officer. The uniform practice of the Government seems to have been to regard such action by the reviewing officer as tantamount to an acquittal by the court itself, and it cannot be doubted that such is the effect of the order of the reviewing officer in this case.

Inasmuch, then, as the soldier stands acquitted, not only of the offense of desertion, but of all lesser offenses included within the greater, it results that he is *in law* innocent of all these charges, whatever may be his *status* in point of fact; and that there is no authority for withholding his pay for an alleged offense of which he stands acquitted.

Very respectfully, your obedient servant,
B. H. BRISTOW,
Solicitor-General and Acting Attorney-General.

Hon. W. W. BELKNAP,
Secretary of War.

FINN'S POINT, NEW JERSEY.

The act of the legislature of New Jersey, mentioned in this case, considered insufficient to meet the requirements of the law of September 11, 1841, in regard to the cession of jurisdiction over certain land purchased by the United States, at Finn's Point, in that State.

Such cession may take place in two ways: indirectly, by the State consenting to the purchase of the land by the United States; and directly, by the State granting the jurisdiction to the United States.

Finn's Point, New Jersey.

DEPARTMENT OF JUSTICE,

June 22, 1871.

SIR : I have examined the copy of a recent act of the legislature of New Jersey, entitled "An act giving the consent of the State of New Jersey to the erection of defenses at Finn's Point, New Jersey," which accompanied your letter to the Attorney-General of the 13th of May last, asking "whether the jurisdiction therein surrendered is sufficient to warrant the erection of military fortifications on said land."

In my judgment that act does not satisfy the provisions of the joint resolution of September 11, 1841, (5 Stat., 468,) requiring a cession of jurisdiction by the State over lands purchased for fortifications and other purposes enumerated therein, before public money is authorized to be expended thereon. Such cession may take place in two ways: indirectly, by an act of the State legislature consenting to the *purchase* of the land by the United States; and directly, by an act of the State legislature granting the jurisdiction to the United States. But the act under consideration contains neither an assent to the purchase, nor a grant of jurisdiction. It merely gives the consent of the State to the use of the land for a specific purpose, which consent is declared to be "as provided in the sixteenth clause of the 8th section of the first article of the Constitution of the United States, and in the acts of Congress in such case made and provided." I find nothing in that clause which is applicable to the subject, and am unable to determine what particular statute is referred to by the words "acts of Congress in such case made and provided."

As, then, the act does not seem to meet the requirements of the law of 1841, it is not, in my opinion, "sufficient to warrant the erection of military fortifications on said land."

I return herewith the copy mentioned.

Very respectfully, your obedient servant,

B. H. BRISTOW,

Solicitor-General and Acting Attorney-General.

Hon. Wm. W. BELKNAP,

Secretary of War.

Limitation as to Offense of Desertion.

LIMITATION AS TO OFFENSE OF DESERTION.

One T. was apprehended in April, 1871, on the charge of having deserted from the Army in October, 1865, and was detained for trial by a court-martial for that offense. He had enlisted in August, 1865, for the term of three years; from the time of the alleged desertion to the time of the arrest more than five years had expired, and from the expiration of the term of enlistment to the arrest more than two years: Advised that the court-martial has no jurisdiction to try the case, because of the bar presented by the 88th article of war.

The last clause of section 12 of the act of January 29, 1813, was not intended to repeal the 88th article of war, so far as the offense of desertion is concerned, and thus allow a deserter to be tried at any time after the term of his enlistment, notwithstanding two years may have elapsed since the commission of the offense; the limitation imposed by that article still applies.

DEPARTMENT OF JUSTICE,

June 23, 1871.

SIR: I have had under consideration your letter of the 13th instant, and the papers transmitted therewith, relative to the case of C. K. Thompson, an alleged deserter from the Army.

It appears that Thompson was apprehended at Richmond, Indiana, under instructions issued from the Adjutant-General's office on the 13th day of April last, and is now held in confinement at Newport Barracks, awaiting trial by general court-martial upon the charge of having deserted the military service of the United States on or about the 2d day of October, 1865; and the question presented is whether, in view of the lapse of time since the date of the offense, a court-martial has jurisdiction to proceed with the trial.

It is claimed by the Adjutant-General that Thompson was duly enlisted in the Army on the 21st day of August, 1865, for the term of three years, which would have expired on the 21st day of August, 1868; consequently from the time of his desertion to the time of his arrest there had elapsed a period of five years and six months, and from the expiration of his term of enlistment to the arrest, more than two years and eight months.

By the act of April 10, 1806, article 88, (2 Stat., 369,) it is

Limitation as to Offense of Desertion.

declared that "no person shall be liable to be tried and punished by a general court-martial for any offense which shall appear to have been committed more than two years before the issuing of the order for such trial, unless the person, by reason of having absented himself or some other manifest impediment, shall not have been amenable to justice within that period." This act authorizes the appointment of three descriptions of courts-martial, namely, general, regimental, and garrison, but the offense of desertion, as it seems, is cognizable only by a court-martial of the first description, (see O'Brien's Military Law, p. 225; Benét's Military Law, pp. 42, 44; De Hart's Court-Martial, pp. 62, 63;) so that if this offense falls within the provisions above quoted, the trial and punishment of the accused are plainly barred by the limitation of two years thereby imposed, unless "by reason of having absented himself, or some other manifest impediment," he could not have been brought to justice within that period. Inasmuch as it does not appear to be claimed that this case comes within the exception of the 88th article of war, that branch of the subject may be dismissed from consideration. It has been held that the 88th article of war, above quoted, is a limitation upon the jurisdiction of courts-martial, and presents an absolute bar to the trial, (under certain exceptions therein stated,) which cannot be waived even by the accused. (Mr. Wirt's Opinion, 1 Opins., 383; see also Mr. Cushing's Opinion, 6 Opins., 240.)

The 12th section of the act of January 29, 1813, (2 Stat., 796,) which is a re-enactment of the 16th section of the act of January 11, 1812, (*ibid.*, 673,) and also of the 18th section of the act of March 16, 1802, (*ibid.*, 136,) provides "That if any non-commissioned officer, musician, or private shall desert the service of the United States, he shall, in addition to the penalties mentioned in the rules and articles of war, be liable to serve for and during such a period as shall, with the time he may have served previous to his desertion, amount to the full term of his enlistment; and such soldier shall and may be tried by a court-martial and punished, although the term of his enlistment may have elapsed previous to his being apprehended or tried."

The language of the 88th article of war is sufficiently gen-

Limitation as to Offense of Desertion.

eral and comprehensive to embrace all persons liable to be tried by courts-martial, deserters, of course, included. It is understood that, in practice, that article has always been construed as applicable to the offense of desertion. It remains, then, to inquire whether or not the effect of the act of January 29, 1813, *supra*, is to take the offense of desertion by a "non-commissioned officer, musician, or private," out of the operation of the 88th article of war.

It will be observed that this act was in force when the 88th article of war was adopted, and that it has been twice re-enacted since the adoption of that article. It will thus be seen that these two acts of Congress, so far as they relate to the offense of desertion, are laws *in pari materia*, and must be construed with reference to each other. It may well be doubted whether, in the absence of the act of 1813, a soldier was triable by a court-martial, organized after the expiration of his term of enlistment, for any offense committed during his term ; but the latter clause of that act seems designed for the punishment of the offense of *desertion*, although the term of his enlistment may have elapsed previous to his being apprehended or tried. The first clause of the act in question relates solely to the punishment that may be inflicted on a deserter, and cannot be said to be inconsistent with, or to impose any limitation upon, the operation of the 88th article of war. If the act of 1813 and the 88th article of war should be shown to be inconsistent with each other, and, therefore, in conflict, the latter must, necessarily, yield to the former, which has the sanction of subsequent legislative enactment ; but repeals by implication are never favored, and it is not perceived that the two statutes may not stand together. It is not difficult to conceive of a case in which a soldier might be arraigned for trial before a court-martial after the commission of the offense, and yet his term of enlistment have expired previous to his apprehension ; and it is for such a case that the latter clause of the act of 1813 was designed to provide. But I find nothing in that act which authorizes the conclusion that it was intended to repeal the 88th article of war, so far as the offense of desertion is concerned, and thus allow a deserter to be tried at any time after the term of his enlistment, notwithstanding two years may have elapsed since the commission of the offense.

Pier at Oswego, New York.

It follows, from what has been said, that the court-martial organized at Newport Barracks, for the trial of C. K. Thompson for the offense of desertion, has no jurisdiction to try the case, because of the bar presented in the 88th article of war.

The question of the regularity of the enlistment of Thompson, to which reference is made in the papers before me, is one not presented for my consideration by your letter, and upon which no opinion is expressed.

The papers accompanying your communication are herewith returned.

Very respectfully, your obedient servant,

B. H. BRISTOW,

Solicitor-General and Acting Attorney-General.

Hon. WM. W. BELKNAP,

Secretary of War.

PIER AT OSWEGO, NEW YORK.

Parties having proposed to donate to the United States certain land for the extension of the pier and breakwater at Oswego, New York, upon the following conditions, viz., that the work "shall be constructed at or near the point, and substantially upon the plan adopted and recommended by the board of engineers," &c.: Advised that, if the latter condition is omitted, the donation may properly be accepted, even though the former condition is retained, but not otherwise.

DEPARTMENT OF JUSTICE,

June 24, 1871.

SIR: I have examined the papers submitted to the Attorney-General under cover of your letter of the 12th of April last, touching the propositions of certain parties to donate to the United States a piece of land for the extension of the pier and breakwater contemplated to be erected in the harbor at Oswego, New York.

You ask whether it is proper to accept the proposed donation on the conditions named by the parties. Those conditions are that the work "shall be constructed at or near the point, and substantially upon the plan adopted and recommended by the board of engineer officers of the United States Army convened at Oswego, March 30, 1870."

Postal Envelopes.

I perceive no objection to accepting the donation upon the condition that the work be "constructed at or near the point" referred to; but the other condition, requiring the work to be constructed upon the particular plan mentioned, is objectionable in this, that in case it should be deemed expedient to alter that plan substantially, or to construct any part of the work upon a new and different plan, the title of the Government to the premises would be liable to be defeated for breach of condition, after considerable outlay may have been expended thereon. If, then, the latter condition is omitted, I think the donation may properly be accepted, even though the former condition is retained, but not otherwise. However, before any money could lawfully be expended upon the land, it would be necessary to obtain a cession of jurisdiction from the State, as required by the joint resolution of September 11, 1841. (5 Stat., 468.)

The papers received with your letter are herewith returned.

Very respectfully, your obedient servant,

B. H. BRISTOW,

Solicitor-General and Acting Attorney-General.

Hon. WM. W. BELKNAP,

Secretary of War.

POSTAL ENVELOPES.

The act of March 3, 1871, (16 Stat., 571,) prohibits the printing of black lines, marks, or characters, upon the envelopes furnished for the Post-Office Department, except the "return request."

DEPARTMENT OF JUSTICE,

June 28, 1871.

SIR: The question submitted in your letter to me of the 27th instant is this: Whether the printing of black lines upon the envelopes furnished for the Post-Office Department is forbidden by the following provision in the act of March 3, 1871, entitled "An act making appropriations for the service of the Post-Office Department for the year ending June 30, 1872, and for other purposes:" "Provided, That no envelope as furnished by the Government shall contain any lithograph-

St. James Mission, Washington Territory.

ing or engraving, and no printing except printed requests to return the letter to the writer." (16 Stat., 571.)

You inform me that the black lines are printed in the ordinary way on a printing press in the same manner and by substantially the same instrumentality as the "return request." Printing is the forming of characters or marks on paper or similar material by impression I am unable to distinguish, in construing this act, between the impression of one sort of mark and the impression of another sort of mark. And while it is possible that such marks as those in the specimen which you have sent me were not within the special contemplation of Congress, yet I am of the opinion that the universality of the language forbids that any letters, devices, marks, or characters should be printed upon the envelopes except the "return request."

This construction is confirmed by the prohibition in the same provision of lithographing or engraving upon the envelopes, showing that it was the intention of Congress that the envelopes should be perfectly blank with the exception of the "return request."

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. J. A. J. CRESWELL,
Postmaster-General.

ST. JAMES MISSION, WASHINGTON TERRITORY.

In view of the circumstances appearing in this case, it is recommended that the claim of the Roman Catholic Mission of St. James to certain land at or near Fort Vancouver, Washington Territory, used by the United States for military purposes, be resisted, and possession of the premises be retained by the Government, until the mission shall have established its title by the judgment of a competent court of law.

DEPARTMENT OF JUSTICE;

July 3, 1871.

SIR: Your letters of November 30, 1869, February 7, 1870, March 7, 1870, May 26, 1870, and February 28, 1871, relate to the claim of the Roman Catholic Mission of St. James to certain lands at or near Fort Vancouver, Washington Territory, used by the United States for military purposes, and

St. James Mission, Washington Territory.

the opinion of the Attorney-General upon the validity of that claim is requested.

After examination of the voluminous papers submitted to me, I have come to the conclusion that the most serious questions in the case are upon matters of fact, and, therefore, do not fall within the province of the Attorney-General.

The claim is founded upon the following provision in the act to establish the territorial government of Oregon, approved August 14, 1848: "*And provided also,* That the title to the land not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes in said Territory, together with the improvements thereon, be confirmed and established in the several religious societies to which said missionary stations respectively belong."

It is asserted on the part of the mission that the land in controversy was occupied as a missionary station among the Indian tribes at the date of the passage of that act by the ecclesiastics of the Catholic Church. On the other hand, it has been denied by military officers of the United States, who have investigated the claim, that the Catholic establishment at Vancouver, on that date, was a missionary station among the Indian tribes in the sense of that act, and that the use of certain buildings by them at that time for religious purposes was an occupancy in the sense of that act.

These officers report that the pretended mission was a chaplaincy of the Hudson Bay Company for the spiritual benefit of the officers and servants of the company, paid by the company, using buildings erected and owned by the company, and continuing only by the sufferance of the company. Nearly twenty years ago the land was laid off as a military reservation for the use of the United States. Valuable erections and other improvements have been made by the Government, and it has been occupied by troops. Under these circumstances I am of the opinion that the title of the Government should be insisted on, and that the mission should be left to prosecute its claim in a court of law.

The question whether the religious establishment of the claimants was, on the 14th of August, 1848, a missionary station; whether, if a missionary station, it was a station among the Indian tribes; whether its use at that date of any part of the land in controversy was such an occupancy as the

St. James Mission, Washington Territory.

act of Congress required, can be properly determined only by a tribunal which can hear and weigh evidence.

If the act of Congress gave a good title to the mission, no executive action is necessary to complete that title. (See opinion of Attorney-General Bates, 11 Opins., 47.) But in view of the designation of the land for military purposes by public authority in 1854, and the military possession of the greater part of it by the United States troops ever since, of the large pecuniary outlay of the Government upon it, of the series of reports which have come from officers stationed there denying the validity of the claim of the mission—a denial which is certainly well founded in law, if the asserted facts on which it rests can be established—I think it is your duty to maintain the title of the United States to the whole of the reservation, and to hold possession of the same to the exclusion of the mission, until the mission shall have established its claim by the judgment of a competent court of law. Of course, I do not intend by this language to counsel the forcible ejection of the mission from that portion of the premises (if any) which it now occupies, or interruption of its religious, charitable, or educational operations therein, unless the immediate needs of the military service demand the whole of the reservation, or it is found impossible to permit the continuance of the mission upon the premises during the litigation by some friendly arrangement that will not prejudice the ultimate rights of the United States.

I have not overlooked the opinion of Attorney-General Black upon the title, (9 Opins., 339.) I agree with him that the declaration of a military reservation embracing the buildings and inclosed grounds of the mission could not withdraw from the mission a title previously perfected by statute. But the real question in the case is, whether the title had been so perfected; and that can only be ascertained by an investigation of the subject, in which fact and law are so mixed that the questions of law are not susceptible of an independent solution, and, therefore, in my judgment, the whole matter should go before a court and jury.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. Wm. W. BELKNAP,

Secretary of War.

Unlawful Traffic with Indians.

UNLAWFUL TRAFFIC WITH INDIANS.

By the 7th section of the act of February 27, 1851, all laws then in force concerning trade with the Indians were extended to New Mexico; and parties arrested or property seized there, by the military authorities, for violation of those laws, should be placed in the custody of the marshal of the Territory, to be proceeded against according to law.

If the parties arrested were engaged in supplying ammunition to Indians in open and notorious hostility to the United States, who properly came within the description of public enemies, in that case they would seem to be amenable to trial and punishment by court-martial under the 56th article of war.

When any Indian tribes are carrying on a system of attacks upon the property or persons, or both, of the settlers upon our frontiers, or of the travelers across our Territories, and the troops of the United States are engaged in repelling such attacks, this is war in such a sense as will justify the enforcement of the articles of war against persons who are found relieving the enemy with ammunition, &c.

DEPARTMENT OF JUSTICE,

July 19, 1871.

SIR: Your communication of the 3d instant, submitting to me a letter from General Sherman of the 30th ultimo, and other papers relative to the subject of unlawful traffic with certain Indians in the Southwest, has been carefully considered.

It appears from these papers that the military forces of the United States stationed in New Mexico have captured persons who were at the time on a trading expedition to the Comanche Indians, having in their charge a pack-train loaded with powder, lead, and other articles; and also that the same force have captured a large number of cattle from other parties while *en route* from the Comanche country.

You request my opinion as to what disposition should be made of the persons and property thus captured.

The 2d section of the act of June 30, 1834, regulating trade and intercourse with Indian tribes, (4 Stat., 729,) prohibits trade with any of the Indians in the Indian country without license, and the 4th section imposes a penalty, together with forfeiture of goods, for trading there without license. What is deemed Indian country is pointed out in

Unlawful Traffic with Indians.

the 1st section of the act. However, by the 7th section of the act of February 27, 1851, (9 Stat., 587,) all laws then in force concerning trade with the Indians were extended to New Mexico, where, as it seems, the capture mentioned took place. The 28th section of the act of 1834 provides "that when goods or other property shall be seized for any violation of this act, it shall be lawful for the person prosecuting on behalf of the United States to proceed against such goods or other property in the manner directed to be observed in the case of goods, wares, or merchandise brought into the United States in violation of the revenue laws," while the 27th section provides "that all penalties which shall accrue under this act shall be sued for and recovered in an action of debt, in the name of the United States, before any court having jurisdiction of the same," &c. By the 23d section the military forces of the United States were authorized to be employed in the apprehension of any person who may be found in the Indian country in violation of law, and also in the prevention of persons and property from being introduced there contrary to law. This section further provides that every person apprehended by the military shall be taken "to the civil authority of the territory or judicial district in which said person shall be found," and that both persons and property shall be proceeded against according to law.

If, then, in the case under consideration, the parties arrested and the owners of the property seized were unlicensed traders, and the ground of the arrest and seizure was that they were violating the Indian trade and intercourse laws, the statutory provisions just quoted clearly require that the persons arrested and the property seized should be turned over to the appropriate civil authorities to be "proceeded against according to law."

But I observe that General Sherman, in his letter, refers to the parties apprehended by the military as having been captured "while engaged in unlawful traffic with *hostile* Indians;" and the papers submitted show that a portion of the property employed in this trade consisted of ammunition. Now, if the Indians to whom the captured persons were thus supplying ammunition, &c., were in open and notorious hostility to the United States at the time, and, therefore, properly came

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within the description of public enemies, the parties apprehended would seem to be amenable to trial and punishment by court-martial under the 56th article of war, which applies to persons who are not, as well as to persons who are, in the military service. In making this suggestion, I assume that there exists such a state of hostility on the part of the Indians as amounts to war. This state, in our peculiar relations with Indian tribes, is perhaps not susceptible of an exact definition. It is not necessary to the existence of war that hostilities should have been formally proclaimed. When any Indian tribes are carrying on a system of attacks upon the property or persons, or both, of the settlers upon our frontiers, or of the travelers across our Territories, and the troops of the United States are engaged in repelling such attacks, this is war in such a sense as will justify the enforcement of the articles of war against persons who are engaged in relieving the enemy with ammunition, &c. Yet with regard to the property which may be found in their possession, and may be captured with them, it would be advisable to turn that over to the proper civil authorities to be proceeded against under the statute regulating trade and intercourse with the Indians.

In brief, my views upon the general subject presented in your communication may be thus stated: 1. That persons apprehended by the military for unlawful traffic with the Indians, and also the property taken with them, should be placed in the custody of the marshal of the Territory or judicial district in which the capture occurred, whereupon it will be the duty of the United States attorney to institute proceedings for the recovery of the penalty and for the forfeiture of the property under the statutory provisions already cited. 2. That where the parties apprehended have not only been engaged in unlawful traffic with the Indians, but in violating the articles of war, (*e. g.*, relieving the enemy with ammunition, &c.,) they may be tried and punished by court-martial, or be turned over to the civil authorities to be proceeded against, as above mentioned.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. WM. W. BELKNAP,
Secretary of War.

Contracts for Carrying the Mail.

CONTRACTS FOR CARRYING THE MAIL.

The Postmaster-General is not authorized to make any contracts for carrying the mail other than for "temporary service," except under or in pursuance of bids received, after inviting them by advertisement.

Where the lowest bidder at an "annual letting" fails to enter into contract and perform service, the Postmaster-General cannot legally contract with the next lowest bidder who will agree to perform the service at his bid for the whole term, without re-advertising.

After once advertising, and failing to secure a contractor, a contract cannot lawfully be made with a party who has not been a bidder, on a proposition informally submitted for the contract term.

The word "temporary," as used in the 23d section of the act of July 2, 1836, should not be construed to authorize a discretionary contract for a term extending beyond the time when the next annual letting will take effect; except where the exigency arises too late in the contract year for the advertisement and letting to be completed before the beginning of the next year, in which case the right to make temporary contracts extends through the succeeding year.

DEPARTMENT OF JUSTICE,

July 23, 1871.

SIR : Your letter of the 19th instant, after stating the difficulties which have arisen in your Department in consequence of fictitious or "straw" bids for contracts for carrying the mails, propounds to me certain questions as follows : "First. Is the Postmaster-General authorized to make any contracts for the conveyance of mails other than for 'temporary' service, except under, or in pursuance of, bids received after inviting them by advertisement ; or, more particularly, if the lowest bidder at an 'annual letting' fails to enter into contract and perform service, can the Postmaster-General legally contract with the next lowest bidder who will agree to perform the service at his bid for the whole term without re-advertising ; or, is it lawful, after once advertising, and failing to secure a contractor, to contract with a party who had not been a bidder on a proposition informally submitted for the contract term ?"

When an accepted bidder fails to enter into an obligation with sufficient sureties for the performance of the service, the

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27th section of the act of July 2, 1836, (5 Stat., 86,) requires the Postmaster-General "to contract with some other person or persons for the performance of the service."

What authority has the Postmaster-General in contracting under such circumstances? Three answers have been suggested: first, that he must contract with the next lowest bidder; second, that he has an unlimited discretion as to the contractor and the term; third, that he must advertise anew, and award the contract to the lowest bidder under the new advertisement.

The act of July 2, 1836, section 24, (5 Stat., 86,) and the act of March 3, 1845, section 18, (5 Stat., 738,) give the contract to the lowest bidder. No statute authorizes an alternative acceptance of the next lowest, or of any other bid. The contract is offered to the lowest bidder. The bids are tendered for acceptance only in the event that they shall prove to be the lowest, and by the acceptance of one as the lowest, the others are discharged. Thenceforth the law looks only to the successful bidder, and while it holds him and his guarantors responsible for his failure to complete the contract for the performance of the service, (act of March 3, 1825, section 44, 4 Stat., 114; act of July 2, 1836, section 27, 5 Stat., 86,) it does not hold the other bidders in waiting to supply his default. These others have no further claim upon the Government, and the Government has no further claim upon them.

The construction that gives to the Postmaster-General an unlimited discretion upon the failure of the accepted bidder to complete the contract, leaves in operation much of the mischief which the laws on the subject of advertisements and bids were designed to suppress. It was the policy of those statutes to subject the Postmaster-General to a rigid rule in the matter of contracts for the carrying of the mail; and that policy is practically overturned if a single fictitious bid remits the contract to his discretion. An unqualified direction that he shall contract must be taken to signify that he shall contract according to the general rule of mail contracts, to wit, after advertisement and with the lowest bidder. (Act of March 3, 1825, section 10, 4 Stat., 104.) The 23d section of the act of July 2, 1836, (5 Stat., 85,) especially

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provides for advertisement whenever it becomes necessary "to enter into a contract for the transportation of the mails at any other time than the annual letting," (temporary contracts alone excepted,) a provision which seems to have been contrived for such cases as that now under consideration.

From an early period the law has required advertisements for mail contracts. See act of February 20, 1792, section 6, (1 Stat., 234;) act of May 8, 1794, section 6, (*ibid.*, 358;) act of April 30, 1810, section 8, (2 Stat., 595,) and the acts above cited. The object is manifestly to get for the Government the benefit of competition. From necessity an exception is allowed in the case of temporary contracts. (Act of July 2, 1836, section 23.) But a construction which admits the fewest exceptions and leaves the least to the discretion of the Postmaster-General, is most in accordance with the general policy of the law.

I am thus brought to the third of the suggested answers, and adopt it as the most conformable both to the letter and to the general policy of the law. The most plausible objection to it is that it exposes the Department to the vexation of a second fictitious bid. But I do not feel authorized to reject a conclusion, otherwise satisfactory, for the reason that it places a second effort to effect the contract in the same danger as the first.

On account of the loss of time in the first effort, the second offer of the contract must frequently be for less than a full term; and it could not have been the intention of Congress to guard the less by precautions not thrown around the greater. The failing bidder and his guarantors are made liable for the whole difference between his bid and the amount for which, on his failure, the Postmaster-General contracts. (Act of July 2, 1836, section 27.) It is not probable that Congress intended that the amount of this liability should depend on the mere discretion of the Postmaster-General. There would be no inconvenience, under present legislation, if the Department could make sure of the responsibility of the guarantors. But I am informed that no precautions yet devised have been found effectual to this end. Congress can easily provide a remedy; and until that shall be done I see no way to protect the Department from any occasional imposition through fictitious bids.

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Hence, by way of specific answers to your questions, I am of opinion that you are not authorized to make any contracts, for the conveyance of mails, other than for "temporary service, except under, or in pursuance of, bids received after inviting them by advertisement. If the lowest bidder, at an "annual letting," fails to enter into contract and perform service, you cannot legally contract with the next lowest bidder who will agree to perform the service at his bid for the whole term, without re-advertising. It is not lawful, after once advertising and failing to secure a contractor, to contract with a party who has not been a bidder on a proposition informally submitted for the contract term.

Your letter also contains the following inquiries:

"Second. What meaning is to be attached to the word 'temporary' as used in the proviso to the 23d section of the act of July 2, 1836? Can it be made to authorize a period of one year, so as to terminate a contract at the next annual letting; or is it limited to the time actually necessary to advertise, four weeks, and go through the process of opening, deciding, and awarding, as detailed in the law?"

I am of opinion that, except in the case hereinafter mentioned, this word should not be construed to authorize a discretionary contract for a term extending beyond the time when the next annual letting will take effect, but that the Postmaster-General has a discretion within that limit to advertise immediately, or to wait until the time for the usual annual advertisement. The exception to this rule is when the exigency arises too late in the contract year for the advertisement and letting to be completed before the beginning of the next year, in which case the right to make temporary contracts extends through the succeeding year.

This word must be construed not merely with reference to the class of cases which has occasioned your present call for an opinion, but in reference to any other case of an interruption in the regular mail service for which a temporary contract must provide. For illustration, in the accidents to which mail service is liable, an interruption might occur six weeks before the time when the new regular contracts would take effect. Four weeks would be required for advertisement. Congress could not have intended to subject the Postmaster-

Checks Deposited by Bidders for Mail Contracts.

General to the necessity in such a case of incurring the expense of advertisement for a service merely of two weeks, and, for so brief a service, it is not likely that advertisement would produce bids advantageous to the Government.

When, however, the occasion for a temporary contract arises so long before the annual letting as to justify the expense of advertisement, and to make it probable that a saving to the Government would be effected by inviting bids, the Postmaster-General would no doubt feel disposed to conform as closely as possible to the general policy of the law, which is that mail service shall be generally performed by the person who will be bound to do it for the least money, after public advertisement.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. J. A. J. CRESWELL,
Postmaster-General.

NOTE.—The various statutory provisions concerning mail transportation, mentioned in the foregoing opinion, which were in force at the time it was written, have since been repealed by the act of June 8, 1872, (17 Stat., 283.) This act contains the existing law relating to contracts for carrying the mail within the United States. (See sections 243 to 266, inclusive.)

CHECKS DEPOSITED BY BIDDERS FOR MAIL CONTRACTS.

The certified check or draft deposited by a bidder for the transportation of the mail, under the requirements of the 4th section of the act of March 3, 1871, where the contract is awarded to such bidder, should be returned as soon as he files an acceptable bond to faithfully perform his contract.

But if the check or draft was deposited by a bidder whose proposal is not accepted, it should be returned as soon as the contract is awarded to another.

DEPARTMENT OF JUSTICE,

July 24, 1871.

SIR: Your letter of the 12th instant calls my attention to the 4th section of the act of March 3, 1871, (16 Stat., 572,) making appropriations for the service of the Post-Office De-

Checks Deposited by Bidders for Mail Contracts.

partment for the year ending June 30, 1872. That section provides that bidders for the transportation of mails, where the bid exceeds five thousand dollars, shall accompany the bid with a certified check or draft for not "less than 5 per cent. on the amount that they would receive in any one year under such bid. In case any bidder on being awarded any such contract shall fail to enter into good and sufficient bonds to faithfully carry out such contract, such bidder or bidders shall forfeit the amount so deposited to the United States, for the use of the Post-Office Department; otherwise such draft or check so deposited shall be returned to the bidder to whom it belongs."

You request my opinion upon the questions, whether the check deposited by the accepted bidder can be retained after the execution of the contract, in view of the fact that such contracts are sometimes perfected some days or weeks before they are to take effect, and when the Department cannot know whether the service contracted for will be fairly begun and performed; and what should be done with the checks or drafts deposited by persons who are under bid?

The intent of this statute is plain. The deposited check or draft is merely as security for the required bond, and has completed its office and should be returned to the bidder as soon as such bond is filed, no matter how long this may be before the commencement of the service. The deposit is to constrain the bidder to give the bond, and then the bond is to constrain him to perform the service.

The drafts or checks deposited by persons who are underbid should be returned to them as soon as the contract is awarded. This award discharges the unsuccessful bidders, and their checks or drafts deposited for a contingency, which now cannot occur, go back to the depositors.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. J. A. J. CRESWELL,

Postmaster-General.

NOTE.—The 4th section of the act of March 3, 1871, referred to in the above opinion, is repealed by the act of June 8, 1872, (17 Stat., 283,) but its provisions are in the main supplied by section 253 of the latter act.

Compromise of Internal-Revenue Cases.

COMPROMISE OF INTERNAL-REVENUE CASES.

Under section 102 of the act of July 20, 1868, the Commissioner of Internal Revenue has power to compromise cases arising under the internal-revenue laws, before suit, with the advice of the Secretary of the Treasury; but after the commencement of a suit or proceeding in court, the recommendation of the Attorney-General is also necessary.

The power to compromise, under that section, ceases as soon as a judgment in the suit or proceeding is rendered.

But by virtue of authority conferred by section 10 of the act of March 3, 1863, judgments obtained by the United States in civil proceedings instituted under the internal-revenue laws may be compromised by the Secretary of the Treasury, upon the report and recommendation of the attorney or agent of the Government and of the Solicitor of the Treasury.

DEPARTMENT OF JUSTICE,
July 27, 1871.

SIR: Your letter of the 18th instant requests my opinion on the question whether the Commissioner of Internal Revenue and the Secretary of the Treasury can compromise *after* judgment, without the concurrence of the Attorney-General, a case or matter to which, before judgment, the power conferred by section 102 of the internal-revenue act of July 20, 1868, applies.

The authority for compromising internal-revenue cases is found in that section, which is as follows: "That in all cases arising under the internal-revenue laws, where, instead of commencing or proceeding with a suit in court, it may appear to the Commissioner of Internal Revenue to be for the interest of the United States to compromise the same, he is empowered and authorized to make such compromises with the advice and consent of the Secretary of the Treasury; and in every case where a compromise is made, there shall be placed on file in the office of the Commissioner the opinion of the Solicitor of Internal Revenue, or officer acting as such, with his reasons therefor, together with a statement of the amount of tax assessed, the amount of additional tax or penalty imposed by law in consequence of the neglect or delinquency of the person against whom the tax is assessed, and the amount actually paid in accordance with the terms of the

Compromise of Internal-Revenue Cases.

compromise; but no such compromise shall be made of any case after a suit or proceeding in court has been commenced, without the recommendation, also, of the Attorney-General: *Provided*, That it shall be lawful for the court, at any stage of suchsuit or criminal proceedings, to continue the same for good cause shown on motion of the district attorney." (15 Stat., 166.) Under this section the Commissioner can compromise before suit, with the advice of the Secretary of the Treasury. But after the commencement of suit or proceeding in court, the recommendation of the Attorney-General is also necessary.

The letter of the Solicitor-General, transmitted to you on the 1st instant, expressed the opinion, in which I concurred, that the power of compromise under that section ceases when a first judgment is rendered. Up to that point the liability of the defendant is uncertain, and perhaps disputed, and the matter is within the field of compromise. The parties resort to compromise to avoid a trial and judgment; and thus settle for themselves what otherwise the court would settle for them. The judgment fixes the liability, and takes away the most usual motive for compromise.

The right to compromise is understood to embrace the criminal, as well as the civil, liability of the defendant. It has been doubted whether a statutable authority to compromise acts charged as criminal, though not judicially ascertained to be such, is not an encroachment upon the President's constitutional power to grant pardons. This doubt may be captious. But after the judgment of a court that a person is guilty of a criminal offense against the United States, an intention of Congress, that any officer but the President should have power to remit the penalty, is not to be inferred from language susceptible of any other construction.

The act of March 3, 1863, "to prevent and punish frauds upon the revenue," &c., section 10, (12 Stat., 740,) authorizes the Secretary of the Treasury to compromise claims in favor of the United States upon the report and recommendation of the attorney or agent of the Government, and the recommendation of the Solicitor of the Treasury.

This section has received a construction of exceeding liber-

Delivery of Letters.

ality, which I should hesitate to adopt without the authority of a long-established practice. But constraining it, according to this practice, to include all claims of a civil nature, and construing the word "claims" therein (according to the same practice) to include the adjudged, as well as the asserted, rights of the United States, and believing that the policy which induced Congress to allow compromises authorizes a very liberal construction of the statutes, I am of opinion that judgments in civil proceedings, under the internal-revenue laws, may be compromised under this section, and that the concurrence of no officers is required for such compromise except the district attorney or special attorney or agent having charge of the claim and the Solicitor of the Treasury and the Secretary of the Treasury.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. GEO. S. BOUTWELL,

Secretary of the Treasury.

DELIVERY OF LETTERS.

Where a letter was received by mail at a post-office, addressed to a young lady over eighteen but under twenty-one years of age, which is claimed by her and also by her guardian: Advised that the postmaster be directed to deliver it to the young lady, as this course would best meet the requirements of the postal laws.

Any rights which the guardian has, by the laws of the State, over the correspondence of the ward, can be exercised after the letter is delivered by the postmaster to the ward.

DEPARTMENT OF JUSTICE,

August 1, 1871.

SIR: After reflection upon the subject of the application of the postmaster at Canton, Indiana, to the Post-Office Department for direction in the case where letters in his office are addressed to a young lady over eighteen years of age, but under twenty-one, and are claimed both by herself and her guardian, I have come to the conclusion that it is the better course to deliver the letters to the young lady. She is the person to whom the letter is addressed, and thus answers the description in the post-office laws, particularly

Settlement of Quartermasters' Property Accounts.

the 22d section of the act of March 3, 1825, (4 Stat., 108,) and the 32d section of the act of July 2, 1836, (5 Stat., 87,) and in the regulations made by the Post-Office Department, sections 58 and 59.

Any rights which the guardian has by the laws of the State over the correspondence of the ward can be exercised after the letter is delivered by the postmaster to the ward.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. J. W. MARSHALL,

Acting Postmaster-General.

SETTLEMENT OF QUARTERMASTERS' PROPERTY ACCOUNTS.

The laws, regulations, and departmental practice concerning the settlement of war accounts generally, but more especially of *property* accounts relating to the Army, from the commencement of the Government down to the present time, reviewed.

Under the law as it stood before the passage of the act of March 3, 1817, the settlement of property accounts arising in the military service belonged to an officer in the War Department called the superintendent-general of military supplies, who discharged this duty under the direction of the Secretary of War.

The office of superintendent-general of military supplies was abolished by that act, and, as it seems from the last clause of the 16th section thereof, the legislature contemplated that the duties of that officer touching the settlement of property accounts should thereafter be performed by such of the officers of the Treasury, then created, upon whom was devolved the adjustment of accounts pertaining to the military service.

The subsequent course of departmental regulations and practice has in general coincided with that understanding of the statute, and, moreover, the duty and authority of the accounting officers of the Treasury to settle property accounts relating to the Army have been presupposed and distinctly recognized by subsequent legislation.

Thus, the practice of referring such accounts to those officers for settlement is not founded merely upon departmental usage or departmental regulation, but rests upon direct legislative enactment; and they are to be regarded as authorized *by law* to settle such accounts, until Congress shall otherwise provide.

But the act of 1817 left this duty to be discharged by those officers, as it was previously discharged by the superintendent-general of military supplies, that is to say, under the direction of the Secretary of War; and no alteration of the law in that respect has been made by any subsequent statute.

Settlement of Quartermasters' Property Accounts.

It follows that the property accounts of quartermasters in the Army should be transmitted from the War Department to the proper accounting officers of the Treasury for settlement—such settlement to be made by them, however, under the direction of the Secretary of War.

DEPARTMENT OF JUSTICE,

August 4, 1871.

SIR: The Secretary of the Treasury, in a communication dated the 30th of March, 1871, and the Secretary of War in a communication without date, which was received on the 25th of May, 1871, have each requested an opinion from the Attorney-General upon a question that has arisen between the Third Auditor of the Treasury and the War Department, touching the settlement of the *property* accounts of quartermasters of the Army.

That question is substantially this: Whether the property accounts rendered by those officers to the War Department should be transmitted thence to the accounting officers of the Treasury for settlement; in other words, whether the settlement of such accounts is by law devolved upon the accounting officers of the Treasury?

To arrive at a satisfactory conclusion on the subject, it has been found necessary to take into view a number of early statutes concerning the organization of the public service, and the practice thereunder, with reference to the adjustment of accounts for both money and property expended and employed in the military service.

By the act of August 7, 1789, establishing the Department of War, (1 Stat., 49,) the Secretary of War was charged, among other things, with the execution of such duties as should, from time to time, be enjoined on or intrusted to him by the President relative to the "warlike stores of the United States," and furthermore was required to conduct the business of the Department in such manner as the President should from time to time order or instruct.

The act of September 2, 1789, establishing the Treasury Department, (1 Stat., 65,) besides other officers, created a Comptroller, an Auditor, and a Register. This act made it the duty of the Comptroller "to superintend the adjustment and preservation of the public accounts;" of the Auditor, "to receive all public accounts, and, after examination, to certify

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the balance, and transmit the accounts with the vouchers and certificate to the Comptroller for his decision thereon;" and of the Register, "to keep all accounts of the receipts and expenditures of the public money, and of all debts due to, or from, the United States; to receive from the Comptroller the accounts which shall have been finally adjusted, and to preserve such accounts with their vouchers and certificates," &c.

The act of May 8, 1792, making alterations in the Treasury and War Departments, (1 Stat., 279,) created an accountant in the War Department, who was charged with the settlement of "all accounts relative to the pay of the Army, the subsistence of officers, bounties to soldiers, the expenses of the recruiting-service, the incidental and contingent expenses of the Department," &c. He was required to report, from time to time, all such settlements as should have been made by him for the inspection and revision of the Comptroller of the Treasury.

By the 3d section of the act of April 2, 1794, (1 Stat., 352,) an officer was authorized to be employed whose duty it should be, under the direction of the War Department, "to superintend the receiving, safe-keeping, and distribution of the military stores of the United States, and to call to account all persons to whom the same may be intrusted."

The 5th section of the act of May 8, 1792, above cited, provided "that all purchases and contracts for supplying the Army with provisions, clothing, supplies in the Quartermaster's Department, military stores, Indian goods, and all other supplies or articles for the use of the Department of War, be made by or under the direction of the Treasury Department;" and by the act of February 23, 1795, (1 Stat., 419,) a purveyor of public supplies was established in the latter Department, whose duty it was, under the direction and supervision of the Secretary of the Treasury, to "conduct the procuring and providing of all arms, military and naval stores, provisions, clothing, Indian goods, and generally all articles of supply requisite for the service of the United States."

Prior to the two last-mentioned provisions, the general supervision of all purchases of military stores and supplies, as well as the general supervision of the keeping and disposition thereof, under the direction of the President, properly

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fell within the scope of the duties devolved upon the Secretary of War by the act of August 7, 1789. Such purchases were doubtless made, at the period referred to, by officers or agents of the War Department, and either they, or other officers or agents of the same Department, were charged with the custody and disposition of, and were held accountable to that Department for, the stores and supplies thus purchased. The act of September 2, 1789, required the accounts of those officers or agents, with the vouchers, to be sent to the Treasury for adjustment and preservation ; but this requirement obviously included only such accounts and vouchers as related to the expenditure of the public money.

The acts of 1792 and 1795 relieved the War Department of the supervision of purchases of military stores and supplies, and devolved that duty upon the Treasury Department ; but the general supervision of the keeping, preservation, and disposition of the property remained with the former Department as before. Under those acts such purchases were made by officers or agents of the Treasury Department, under the direction of its chief, and their accounts and vouchers were required to be rendered to the accounting officers of the Treasury, (the accountant of the War Department, created by the act of 1792, not being as yet charged with the settlement of this class of accounts;) but the custody and disposition of the stores and supplies purchased by them continued as theretofore in officers or agents of the War Department, to which such officers and agents were accountable for the property. This is shown by the act of April 2, 1794, already cited, which authorized the employment of an officer specially charged with the duty, under the direction of that Department, of superintending the receiving, safe-keeping, and distribution of such stores, and of calling to account all persons intrusted therewith.

The following extracts from instructions to that officer, who was officially designated, "intendant of military stores," or "superintendent of military stores," issued as early as October 2, 1794, and which are preserved in the records of the War Department, distinctly mark the separate functions of each of the Departments named in connection with military supplies, and also indicate the separate duties of each

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with reference to money accountability and property accountability, under the then existing laws :

“1. That all arrangements having for their object the purchase of military stores, clothing, Indian goods, supplies in the Quartermaster's Department, and, generally, all articles for the use of the War Department, will be made by or under direction of the Treasury.

“2. That all arrangements having for their object the safe-keeping, transfer, or final disposition of any of the articles so purchased, will be made by or under the direction of the Secretary of War.

“3. That accounts are to be kept in your office relative to the receipt, safe-keeping, and distribution of all military stores which have been or may be purchased, for which purpose all persons who have or may receive the same are responsible to you as an accounting officer.

* * * * *

“The Treasury Department will, whenever it is practicable, require the contractors and purchasing agents to lodge receipts for the delivery of articles procured by them, in your office, for which acknowledgments from you will be expected as vouchers to their cash accounts at the Treasury.”

However, by the act of July 16, 1798, (1 Stat., 610,) the supervision of purchases of Army supplies was restored to the War Department. The 3d section of that act required all purchases of and contracts for supplies for the military service of the United States to be made by or under the direction of the chief officer of that Department, and provided that all agents or contractors for such supplies should render their accounts for settlement to the accountant thereof, which were also to be subject to the revision of the accounting officers of the Treasury. The 4th section made it the duty of the purveyor of public supplies to execute the orders of the Secretary of War relative to the procuring and providing of all kinds of stores and supplies for the use of the War Department, and required him to render his accounts appertaining thereto to the accountant of that Department, which accounts were to be subject to revision by the accounting officers of the Treasury.

The general direction and control of all officers or agents

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charged with the procuring or purchasing of military stores, and of all officers or agents charged with the custody and distribution thereof, were now lodged exclusively in the War Department, to the head of which such officers or agents were directly accountable for the proper performance of their duties. Accounts rendered by them for expenditures incurred in the purchase of supplies, or what may be styled their money accounts, were regularly transmissible to the accountant of that Department for settlement, after which they were required to be sent to the Treasury for revision and preservation. Accounts rendered by them relating to the receipt, custody, and disposition of the supplies purchased, or what may be styled their property accounts, were regularly transmissible to the "superintendent of military stores," upon whom was devolved the duty of examining and keeping and preserving this class of accounts. Thus the money accounts and the property accounts, as relating to military supplies, were at this period settled by different officers of the War Department, the former under the superintendence and subject to the revision of the Comptroller of the Treasury, and the latter under the supervision and direction of the Secretary of War alone. And they were, moreover, preserved separately, the one in the Treasury Department, and the other in the Department of War.

The act of March 16, 1802, fixing the military peace establishment, (2 Stat., 132,) authorized the appointment of military agents. The 17th section of the act made it the duty of those agents to purchase, receive, and forward to their proper destination all military stores and other articles for the troops in their respective departments, and all goods and annuities for the Indians which they might be directed to purchase, or which should be ordered into their care by the Department of War, and they were required to account with that Department annually for all the public property which might pass through their hands, and all the moneys which they might expend in the discharge of their duties respectively.

By the act of March 28, 1812, (2 Stat., 696,) a Quartermaster's Department for the Army was established, the officers whereof included a Quartermaster-General, deputy quartermasters, and assistant deputy quartermasters, who, in addi-

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tion to their duties in the field, were required to purchase military stores, camp equipage, and other articles requisite for the troops when thereto directed by the Secretary of War. This act also created a commissary-general of purchases, and provided for the appointment of deputy commissaries; the former being authorized to make purchases under the immediate direction of the Secretary of War, and the latter being authorized to make them when thereto directed either by the Secretary, the commissary-general, or the officers of the Quartermaster's Department mentioned above. The office of purveyor of public supplies was abolished, and the purveyor was required to deliver the public property in his possession over to the commissary-general, or to one of his deputies; so, also, the act authorizing the appointment of military agents was repealed, and those agents required to deliver the property in their possession over to the deputy and assistant deputy quartermasters. The act, moreover, made it the duty of the Quartermaster-General to account with the War Department for all property which might pass through his hands or the hands of the subordinate officers in his Department, or that might be in his or their care or possession, and for all moneys which he or they might expend in discharging their duties. But by a law passed shortly afterward, (act of May 22, 1812, 2 Stat., 742,) the Quartermaster-General, together with the deputy and assistant deputy quartermasters, were each required to give bonds conditioned "for the faithful expenditure of all public moneys and accounting for all public property which may come into their hands respectively;" and the Quartermaster-General was relieved from all liability for money or property in the hands of the subordinate officers of his Department.

On the 3d of March, 1813, an act was passed "to provide for the supplies of the Army of the United States, and for the accountability of persons intrusted with the same," (2 Stat., 816.) The 1st section of this repealed the provision of the act of April 2, 1794, under which the "superintendent of military stores," hereinbefore referred to, was appointed. But the 2d section authorized the appointment of a superintendent-general of military supplies to reside at the seat of Government, whose duty it should be, under the direction of

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the Secretary of War, "to keep proper accounts of all the military stores and supplies of every description purchased or distributed for the use of the Army of the United States, and of the volunteers and militia in their service; to prescribe the forms of all the returns and accounts of such stores and supplies purchased, on hand, distributed, used, or sold, to be rendered by the commissary-general of purchases and his deputies, by the several officers in the Quartermaster's Department, by the regimental quartermasters, by the hospital surgeons and other officers belonging to the hospital and medical departments, and by all other officers, agents, or persons who shall have received, distributed, or been intrusted with such stores and supplies as aforesaid; to call to account all such persons, to audit and settle all such accounts, and, in case of delinquency, to transmit the account, and to state the value of the articles unaccounted for by such delinquency to the accounting officers of the Treasury for final settlement and recovery of such value; to transmit all such orders, and generally to perform all such other duties respecting the general superintendence of the purchase, transportation, safe-keeping, and accountability of military supplies and stores, as aforesaid, as may be prescribed by the Secretary of the War Department."

The 3d section of the same act required all officers, agents, or persons who should have received, or might be intrusted with, any military stores or supplies of any description whatever to render quarterly accounts of the disposition and state of all such stores and supplies to the superintendent aforesaid, and also to make such other returns respecting the same and at such other times as the Secretary of War might prescribe. By a proviso to this section, the accounts and returns, thus rendered, were to relate only to the articles of supply which might have been received and disposed of, or which might remain on hand, and were not to embrace the "specie accounts" for moneys disbursed by such officers, agents, or other persons; the latter being required to be rendered to the accountant for the War Department, as theretofore.

The 4th section required all officers, agents, or other persons, who might receive moneys in advance from the War

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Department, to render quarterly accounts to the accountant for that Department of their "specie receipts and disbursements," and also to make such other monthly summary statements thereof to the Secretary of War as he might prescribe; and it further provided that "the quarterly accounts of supplies or of moneys, rendered as aforesaid, shall be respectively settled by the superintendent-general of military supplies, and by the accountant of the War Department, according to their respective authorities, within three months after the time when such accounts shall have respectively been rendered to them."

The last-mentioned statute preserved the general features of the pre-existing law touching the settlement of money accounts and property accounts arising in the military service, while it defined more distinctly and in greater detail the duties of officers relative thereto, and especially in connection with property accounts. The two kinds of accounts were, as before, referred each to a different officer of the War Department for settlement; the money accounts to the accountant of that Department, the property accounts to the superintendent-general of military supplies, who succeeded the former "superintendent of military stores."

The settlement of money accounts by the accountant of the War Department was made under the superintendence of the Comptroller of the Treasury, and subject to his revision as previously. The forms of keeping and rendering those accounts were authorized to be prescribed at the Treasury by the 9th section of the act of May 8, 1792, (1 Stat., 281,) and the accounts themselves were required to be preserved there by the act of September 2, 1789, (1 Stat., 65.)

But the settlement of property accounts by the superintendent-general of military supplies was made under the direction of the Secretary of War solely, and the forms of these accounts were authorized to be prescribed by the former under the direction of the latter. When an officer failed to account satisfactorily for property intrusted with, or as the statute expresses it, "in case of delinquency," the superintendent was required to transmit the account and to report the value of the property to the accounting officers of the Treasury "for final settlement and recovery of such

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value." This is the only case in which a property account was required to be sent to the Treasury Department, and the only object of the requirement here was to enable the accounting officers of that Department to raise a money charge against the delinquent officer, this being peculiarly within their province.

The law, as it now stood, concerning the settlement of war accounts, remained without any modification until the passage of the act of March 3, 1817, entitled "An act to provide for the prompt settlement of public accounts." (3 Stat., 366.) In the mean time, however, the appointment of an additional accountant in the War Department was authorized by the act of April 29, 1816, (3 Stat., 322,) whose duty it was to adjust and settle all the accounts in that Department existing at the conclusion of the then late war, and which were unsettled, in the execution of which duty he was required to conform to the regulations which governed the accountant of the War Department.

By the act of March 3, 1817, referred to above, the offices of accountant and additional accountant of the War Department, and also the office of superintendent-general of military supplies, were abolished; it was declared that "all claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors," should be settled and adjusted in the Treasury Department; and in addition to the officers in the latter Department then established, four Auditors, (styled the Second, Third, Fourth, and Fifth Auditors,) and one Comptroller, (styled the Second Comptroller,) were created.

Section 4 of this act made it the duty of the Second Auditor "to receive all accounts relative to the pay, bounties, and premiums, military and hospital stores, and the contingent expenses of the War Department;" and of the Third Auditor "to receive all accounts relative to the subsistence of the Army, the Quartermaster's Department, and generally all accounts of the War Department other than those provided for;" and both Auditors were required to "examine the accounts respectively, and certify the balance, and transmit the accounts, with the vouchers and certificate, to the Second Comptroller for his decision thereon."

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The 9th section made it the duty of the Second Comptroller to examine all accounts settled by those officers, and certify the balances arising thereon to the Secretary of War; and, among other things, to report to the latter the official forms to be issued in the different offices for disbursing the public money in the War Department, and the manner and form of keeping and stating the accounts of the persons employed therein; and also to superintend the preservation of the public accounts, subject to his revision.

The 5th section further made it the duty of the Auditors charged with the examination of the accounts of the War Department to keep all accounts of the receipts and expenditures of the public money in regard to that Department, and of all debts due to the United States or moneys advanced relative to that Department, to receive from the Second Comptroller the accounts which shall have been finally adjusted, and to preserve such accounts with their vouchers and certificates, &c.

Looking at these provisions alone, there might be a question whether the legislature intended to devolve upon the Second and Third Auditors anything more than the examination and settlement of money accounts arising in the War Department which had theretofore devolved upon the accountants of that Department, whose offices were just abolished, or whether, in abolishing the office of superintendent-general of military supplies, it was not the design of the legislature simply to leave the matter of property accountability to be regulated by the Secretary of War through the chiefs of the various staff departments under his control, and not to transfer the duties of that office to the Auditors also. But we are relieved from any doubt on this subject by the last clause of the 16th section of the act, which authorizes the Secretary of the Treasury "to assign the several sums appropriated for clerk hire in the offices of the accountant, additional accountant, *superintendent-general of military supplies, * * ** to the officers hereby created, *to which their respective duties shall be assigned.*" Here, it is very manifest, the legislature contemplated that not only should the duties of the accountants of the War Department be transferred to the newly-created officers of the Treasury, but likewise the duties of the superintendent-general of military supplies.

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This seems to have been the view entertained in the Treasury Department, at the very beginning, with regard to the drift and aim of the statute. Thus, in a letter of instructions written by the Third Auditor, under date of March 27, 1817, and sent to the different officers of the Quartermaster's Department, there is contained the following:

"At the same time that you render your accounts and vouchers for moneys expended, it will be necessary that you render an account accompanied by the proper vouchers for the disposition of the public property in your hands belonging to the Quartermaster's Department, either antecedently to the purchases made by you during the quarter, (if any,) or confined to the articles purchased and charged by you in those accounts; in other words, you *are to render to this* (the Third Auditor's) *office the accounts you formerly rendered to the superintendent-general of military supplies* for all public property belonging to the Quartermaster's Department received and distributed by you during the quarter, accompanied by the requisitions and receipts for the delivery of the articles."

And the subsequent action of the War Department was in entire harmony with that view, as appears by the General Regulations for the Army, soon after published. Thus, in regard to the Quartermaster's Department, the Regulations of 1821 contain the following paragraphs:

"28. All officers and agents of the Quartermaster's Department will keep and render their accounts, both of money and property, according to the forms annexed to this article; and each officer and agent of the Department shall forward his accounts to the office of the Quartermaster-General within twenty days after the expiration of the quarter. It shall be the duty of the Quartermaster-General to examine and transmit them, with his remarks, to the proper accounting office of the Treasury Department," &c. (Page 183.)

"115. All officers of the Quartermaster's Department, and all officers and agents making disbursements on account of the Department, will make and forward direct to the Quartermaster-General, to be transmitted by him to the proper accounting office of the Treasury Department, the following returns and accounts, viz, quarterly returns of quartermaster's stores,

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received and issued agreeably to Form No. 6, supported by vouchers corresponding with Forms Nos. 7, 8, 9, 10, 11, 12, 13, and 14; quarterly accounts-current of money received, expended, and remaining on hand on account of the Quartermaster's Department, agreeably to form No. 15, supported by vouchers corresponding with Forms Nos. 16 and 17," &c., (p. 199.)

So, in regard to the Subsistence Department, the same regulations contain the following:

"5. It shall be the duty of the assistant commissaries of subsistence to receive and account in the manner hereinafter prescribed for all subsistence stores intrusted to their charge, and make and transmit to the proper accounting officer, through the office of the Commissary-General of Subsistence, *all returns and accounts,*" (p. 258.)

So, in regard to the Ordnance Department, the same regulations provide:

"20. To insure strict and proper accountability, and promote a just economy, all officers and agents who have charge of ordnance stores, or who make disbursements on account of the Ordnance Department, will keep and render their accounts, both of money and property, according to the prescribed forms, and will forward them to the Ordnance Office (Washington) within twenty days after the expiration of the quarter for which they are rendered. The accounts, after they shall have been examined at the Ordnance Office, will be transmitted to the proper accounting officers of the Treasury," (p. 174.)

So, as respects the recruiting service, the same regulations contain the following directions:

"7. Superintendents of the recruiting service will transmit monthly accounts and vouchers for bounties and premiums and contingencies to the Adjutant-General, and quarterly accounts and vouchers for clothing and camp-equipage to the Quartermaster-General, and for arms and accoutrements to the Ordnance Department, for their inspection and examination previous to their being passed to the Second Auditor of the Treasury Department for settlement," (p. 311.)

See, also, with reference to articles purchased for the medical department, par. 6, p. 270, and par. 16, p. 272, of the same regulations.

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The Army Regulations of 1825 (the next of the series promulgated subsequent to the act of 1817) contain similar provisions relating to the disposition and settlement of property accounts. The paragraphs above quoted or cited from the Regulations of 1821, concerning property accounts appertaining to the quartermaster's, subsistence, and medical departments, and also the recruiting service, are substantially re-adopted; (see Regulations of 1825, par. 1004, p. 219; par. 1095, p. 237; par. 1135, p. 305; par. 1184, p. 315; par. 1194, p. 318; and par. 1276, p. 353.) Touching ordnance property the Regulations of 1825 contain the following:

"950. All officers, store-keepers, or agents having the charge or custody of ordnance and ordnance stores, in any army, garrison, arsenal, magazine, or depot, will make and transmit direct to the ordnance office quarterly returns of all such property in their charge, and according to the forms prescribed by the Ordnance Department; which returns, after being duly examined, will be transmitted to the proper accounting officer of the Treasury," (page 205.) This is followed by more specific directions, to the same effect, in par. 956, p. 207.

It should be observed that the Regulations of 1821 contain no special directions concerning the settlement of property accounts arising in the Engineer's Department; but, as they provide that "when property is not accounted for, nor its loss satisfactorily explained, the officer to whom the care of it had been confided will be charged with the value of the same," (par. 18, p. 168,) it would seem that some system of property accountability then existed in this branch of the service. The Regulations of 1825, however, contain instructions and forms for the rendition of property accounts in the Engineer's Department, (see par. 897, p. 171;) and from a note to par. 897, just cited, it appears that quarterly returns of property were required to be furnished in duplicate, one copy to be filed in that department, and the other to accompany the quarterly accounts, (meaning hereby, as I conceive, money accounts.)

The foregoing extracts and citations from the Army Regulations of 1821 and 1825 show what the understanding of the

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War Department then was in regard to the scope and design of the act of 1817, and also indicate the practice of the Department thereunder. That understanding undoubtedly was, that Congress intended by the act mentioned to devolve the duties of the superintendent-general of military supplies, (which embraced the settlement of property accounts,) as well as the duties of the accountants of the War Department, (which embraced the settlement of money accounts,) upon the Auditors or accounting officers of the Treasury ; and that such, indeed, was the purpose contemplated by Congress, plainly appears from the language of the last clause of the 16th section of that act, to which reference has already been made.

Accordingly, the provision in the 2d section of the act of May 18, 1826, (4 Stat., 174,) which requires the returns and vouchers of certain officers for clothing or camp equipage, after due examination by the Quartermaster-General, to be transmitted for settlement to the proper office of the Treasury Department, is not "inconsistent with the general tenor of the laws regarding accountability in the War Department," but, on the contrary, is entirely consonant to the laws and regulations then in force respecting the settlement of property accounts arising in that Department. The act, indeed, presupposes the existence of an officer in the Treasury Department charged with the duty of settling such accounts.

The Army Regulations of 1835, which are the next in order, continued in force the system of accountability in the Quartermaster's Department, both as respects money and property, which existed under the former regulations, (see par. 106, p. 156.)

All persons having the charge and custody of ordnance stores were directed to make and transmit quarterly returns of the same to the chief of the Ordnance Department, which returns, after having been duly examined, were required to be transmitted to the proper accounting officers of the Treasury, (par. 50, p. 169.)

So, also, the officers of the Subsistence Department were directed to receive and account in the manner prescribed for all subsistence stores intrusted to their charge, and make out and transmit to the proper accounting officer, through the

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Commissary-General of Subsistence, all returns and accounts; and it was made the duty of the Commissary-General to receive their returns and accounts, and examine and adjust them for settlement at the Treasury, (par. 25, pp. 182, 183.)

The Army Regulations of 1841 contain similar directions as to the rendition and settlement of property accounts. Thus, as to ordnance and ordnance stores, see par. 912, p. 167; as to quartermaster's property, par. 1036, p. 201; as to subsistence, par. 1083, 1087, pp. 257, 258; as to the property of the Medical Department, par. 1141, p. 287; and as to property purchased in the recruiting service, par. 708, p. 124.

The Regulations of 1841 (so far, at least, as they related to the administrative branches of the staff) remained in force until 1857, when a new revision of regulations for the Army was published.

The Regulations of 1857, while they require the rendition of property returns or accounts to the chiefs of the various staff departments, give no specific directions respecting the ulterior disposition or settlement of such accounts. See concerning property of the Quartermaster's Department, par. 1043, 1054, 1056, pp. 135, 136; of the Subsistence Department, par. 1097, p. 210; of the Medical Department, par. 1110, p. 242; of the Engineer's Department, par. 1222, 1223, p. 314; of the Ordnance Department, par. 1271, p. 337; and, finally, of the recruiting service, par. 1333, pp. 427, 428.

However, among some general instructions relative to "public property, money, and accounts," contained in the same Regulations, appears the following:

"936. Every officer intrusted with public money or property shall render all prescribed returns and accounts to the Bureau of the Department in which he is serving, where all such returns and accounts shall pass through a rigid administrative scrutiny before the money accounts are transmitted to the proper officer of the Treasury Department for settlement." (Page 120.)

The Revised Regulations of 1861 re-adopted the provisions of the Regulations of 1857 cited above, including the paragraph just quoted from the latter.

Now, notwithstanding the absence of any directions in the Revised Regulations of 1857 and 1861, requiring the trans-

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mission of property accounts to the Treasury Department for adjustment, still, in practice, such accounts were regularly referred to that Department after the adoption of those revisions just as they had been prior thereto, and for the same purpose—a circumstance which shows that the omission of directions of the character referred to in the Regulations mentioned had no special significance whatever. And with regard to the paragraph quoted therefrom, which requires all returns and accounts to undergo “a rigid administrative scrutiny before the *money accounts* are transmitted to the proper officers of the Treasury Department for settlement,” though this language would seem to imply that *only* money accounts were to be transmitted thither, yet the practical construction thereof was otherwise. Moreover, “administrative scrutiny,” as employed in that paragraph, does not mean settlement in the case of property accounts any more than it does in the case of money accounts, but merely an examination preliminary to settlement; so that the provision really proposes no new disposition respecting the *settlement* of accounts of the former description, but leaves that matter exactly as it was before.

It is thought proper, at this point, to notice a change introduced by statute in regard to the time and mode of rendering accounts, as remotely connected with the subject under consideration.

By the 2d section of the act of January 21, 1823, (3 Stat., 723,) all disbursing officers or agents of the United States were required to render their accounts quarterly to the proper accounting officers of the Treasury, with the vouchers necessary to the correct and prompt settlement thereof, within three months after the expiration of each successive quarter, if resident within the United States, and within six months if resident in a foreign country. This provision extended to disbursing officers in the military service, but it only applied to accounts relating to the receipt and expenditure of public money, or money accounts. These officers, however, although they rendered their money accounts quarterly, as required by the law, did not render them *directly* to the accounting officers of the Treasury; those accounts (as well as the property accounts) being transmitted under the directions contained in

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the Army Regulations immediately to the chiefs of the various staff departments in which the officers were serving, who, after an administrative examination thereof, sent them to the Treasury.

Such was the practice, in regard to war accounts, at the time of the passage of the act of July 17, 1862, entitled "An act to provide for the more prompt settlement of the accounts of disbursing officers." By this act disbursing officers were required to render their accounts monthly, instead of quarterly, as theretofore, and it further provided that "such accounts, with the vouchers necessary to the correct and prompt settlement thereof, shall be rendered *direct* to the proper accounting officer of the Treasury," &c. This statute being applicable to money accounts exclusively, the Third Auditor writes as follows, for the information of disbursing officers whose accounts were settled by him, in a circular letter of June 20, 1863:

"Property returns and reports prescribed by Army Regulations are not required to be sent to the Treasury; nor do officers accountable for property alone render accounts therefor to the Treasury. Such returns, reports, &c., should be sent to the chief of the proper military Bureau. It is only by officers who have received public money, either by advances from the Treasury, by transfer from some disbursing officer, or some other source, that accounts, with the vouchers for their disbursements, are required to be sent direct to the Treasury under the provisions of the act of 17th July, 1862."

I do not understand the Third Auditor, as has been suggested, to "specifically disclaim any necessity for the property returns and reports prescribed in the Army Regulations being sent to his office, and, by implication, the existence of any law or custom by which officers accountable for property are required to render returns therefor to the Treasury Department." The object of his circular was to explain the scope and meaning of the act of 1862, as to rendition of accounts, and the explanation given imports simply this: that money accounts only are required by *that act* to be sent directly to the Treasury, while property accounts should, as before, be sent by the officer directly to the chief of the proper military Bureau, the act not applying to *them*. In fact, the practice of transmitting property accounts to the Treasury

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for settlement, after the receipt and examination thereof by the heads of military Bureaus, continued subsequently to the passage of the act of 1862, and to the issue of that circular, and also subsequently to the publication of the Revised Regulations of 1863, below mentioned, the same as previously thereto.

In the next and latest revision of the Army Regulations, (that of 1863,) money accounts are required to be rendered monthly direct to the Auditors of the Treasury, and property accounts also are required to be rendered monthly, instead of quarterly, as formerly, but these are to be sent direct to the heads of the proper military Bureaus, and not (as in case of money accounts) direct to the Treasury. With these modifications, the revision of 1863, so far as it relates to the subject of accounts, either of money or property, re-adopts the previous regulations.

It should be observed, however, that by a resolution passed March 2, 1867, "to facilitate the settlement of accounts of disbursing officers," (14 Stat., 571,) Congress repealed the provision of the act of 1862, requiring money accounts with the vouchers to be rendered direct to the Treasury, and declared that such accounts and vouchers should thereafter be sent to the Bureau to which they pertain, and, after examination there, be passed to the proper accounting officers of the Treasury for settlement. By this enactment the practice that prevailed prior to the act of 1862, as regards the rendition of war accounts, was restored, except that they were required to be made up and forwarded monthly, instead of quarterly. Both money and property accounts were now (as they had been before the act of 1862) sent by the officers rendering them direct to the Bureaus of the War Department, whence, after undergoing an administrative examination, they were regularly transmitted to the Treasury for adjustment.

Besides the various statutes already referred to, the recent temporary act of June 23, 1870, (16 Stat., 166,) may be appropriately cited in connection with the present inquiry. The 1st section of this act authorizes the proper accounting officers of the Treasury, in the settlement of the accounts of disbursing officers of the War Department, arising within a certain period, to allow such credits "for over-payments, and

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for losses of funds, vouchers, and *property*," as they may deem just and reasonable, when recommended under authority of the Secretary of War by the heads of the military Bureaus to which such accounts respectively pertain; and the 2d section provides that accounts of officers, whether of the line or staff, "for Government property charged to them," may be closed by the proper accounting officers, (meaning the accounting officers of the Treasury,) under certain restrictions. This enactment obviously proceeds on the assumption that the accounting officers of the Treasury are already clothed with authority to settle the accounts of disbursing and other officers in the military service respecting public property, as well as those respecting public funds, for which the latter may be responsible; and such authority being in fact exercised by the former at the time, the act may with propriety be regarded as a distinct legislative recognition of the validity thereof.

Recurring, now, to the act of March 3, 1817, and to the course of legislation and of departmental regulation and practice from the passage of that act down to the act of June 23, 1870, the following conclusions are, I think, clearly deducible therefrom :

1. That, in contemplation of the act of March 3, 1817, the duties of the superintendent-general of military supplies, touching the settlement of property accounts, were thereafter to be performed by such of the officers of the Treasury, then created, upon whom was devolved the adjustment of accounts pertaining to the military service.
2. That the subsequent course of departmental regulation and practice has in general coincided with that understanding of the statute.
3. That the duty and authority of the accounting officers of the Treasury to settle property accounts relating to the Army have been presupposed and distinctly recognized by subsequent legislation. (See act of May 18, 1826, and act of June 30, 1870, above cited.)

Thus the practice of referring property accounts arising in the military service to the accounting officers of the Treasury for settlement is not founded upon departmental usage or departmental regulation merely, but rests upon direct legislative enactment. So that, until Congress shall otherwise

Settlement of Quartermasters' Property Accounts.

provide, those officers are to be regarded as authorized *by law* to settle such accounts.

Yet, their authority relative to the settlement of those accounts does not exist independent of, but rather in subordination to, the Department of War. Originally, the general supervision of the keeping, preservation, and disposition of property in the military service belonged to that Department, and it belongs there still. All officers charged with the custody, distribution, or issuing of any stores or supplies of any description, are, and have always been, accountable to the War Department for the discharge of their duties and for the property intrusted with them. We have seen that, immediately prior to the act of 1817, an officer existed in that Department whose duty it was to audit and settle property accounts, and that he was required to perform this duty under the direction of the Secretary of War. By the provisions of that act, the duty of the officer referred to was transferred to the accounting officers of the Treasury; nevertheless, it was left to be performed, as before, under the direction of the Secretary of War. No alteration of the law in this respect has been made by any subsequent statute, and hence, as regards the settlement of property accounts, there exists an official relation between the Secretary of War and the accounting officers of the Treasury charged with such settlement. But while this is true in reference to property accounts, it is not true in reference to money accounts arising in the military service; the latter being now, and ever having been, settled under the supervision, and subject to the revision, of the Treasury Department exclusively, with the exception, perhaps, of a few special cases.

Upon the question submitted, then, which, as I understand it, relates to the property accounts of quartermasters of the Army, I am of the opinion that those accounts should be transmitted from the War Department to the accounting officers of the Treasury for settlement, these officers being charged by law with such settlement, under the direction of the Secretary of War.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. GEORGE S. BOUTWELL,

Secretary of the Treasury.

Puget Sound Agricultural Company.

PUGET SOUND AGRICULTURAL COMPANY.

The *proviso* to the appropriation made by the act of February 21, 1871, for paying to the British government the last installment of the amount awarded by the commissioners under the treaty of July 1, 1863, in satisfaction of the claims of the Puget Sound Agricultural Company, which requires all taxes legally assessed upon property of that company, covered by the award, to be satisfied, or the amount thereof to be withheld from the sum appropriated, is applicable only to such taxes as have been imposed by the laws of the United States.

Accordingly, taxes assessed upon the property of the company by the authorities of Pierce County, Washington Territory, under the territorial laws, should not be so withheld.

DEPARTMENT OF JUSTICE,

August 7, 1871.

SIR: Your letter of the 1st instant presents a question arising under the act of February 21, 1871, making appropriations for the consular and diplomatic expences of the Government for the year ending June 30, 1872, and for other purposes.

The last of the appropriations in that act is as follows:

“To pay to the government of Great Britain and Ireland the second and last installment of the amount awarded by the commissioners under the treaty of July 1st, eighteen hundred and sixty-three, in satisfaction of the claims of the Hudson's Bay and of the Puget Sound Agricultural Company, three hundred and twenty-five thousand dollars, in gold coin: *Provided*, That, before payment shall be made of that portion of the above sum awarded to the Puget Sound Agricultural Company, all taxes legally assessed upon any of the property of said company, covered by said award, before the same was made and still unpaid, shall be extinguished by said Puget Sound Agricultural Company, or the amount of such taxes shall be withheld by the Government of the United States from the sum hereby appropriated.” (16 Stat., 419.)

Attorneys for Pierce County, Washington Territory, have transmitted to you a certificate of John Latham, auditor of Pierce County, Washington Territory, under the seal of the commissioners' court of that county, that a certain annexed

Puget Sound Agricultural Company.

paper is a true and correct transcript of the delinquent-tax rolls, so far as relates to the taxes of the Puget Sound Agricultural Company of Pierce County, Washington Territory, with the percentage added thereto, according to law, "as fully and as amply as the same appears of record in my office." The paper annexed purports to be a statement of delinquent taxes due to Pierce County, Washington Territory, by the Puget Sound Agricultural Company on one hundred and sixty-one thousand acres of land from the year 1859 to 1869, inclusive. These taxes are distributed under the heads of county tax, school tax, territorial tax, and road tax, the whole amounting to \$27,062.64; and there are additions of various percentages running from twenty-five per cent. on the tax of 1869 to two hundred and seventy-five per cent. upon the tax of 1859, raising the total to the sum of \$61,305.22. No explanation is given in the certificate or annexed paper of the reason for these additions. But it is probable that they are claimed as due for the delinquency of the tax-payer.

You request my opinion as to whether the law requires the retention in the Treasury of the amount of the said original taxes and of the additions thereto.

The appropriation above quoted is in fulfillment of a stipulation in the treaty of July 1, 1863, which, after providing for a decision of the claims of the company by commissioners, engages in the fourth article that the sums awarded shall be paid in two installments, within specified times, "without any deduction whatever." (13 Stat., 652.) If this proviso is to cause the payment of a less sum than the amount awarded, it will produce a breach of the treaty, and make the country responsible to the foreign power for such a breach. A statute which may have such consequences should receive the strictest construction allowable under established rules. Not denying the right of Congress to repeal a treaty, or any provision of it, so far at least as to control the action of the Executive in relation to it, yet I think that a statute which may have that effect should be held to mean no more than its language necessarily imports.

Under this rule, when the term *taxes* is used in such an act of Congress, without explanation from the context or other

Puget Sound Agricultural Company.

noticeable circumstances, it must be understood to mean taxes under the laws of the United States; that is, taxes known as national taxes, in distinction from State or territorial taxes. Where the Government is both a debtor and creditor of the same party, Congress might think it no substantial, though a literal, violation of an international covenant to deduct what is due to this Government from what this Government owes to the other party. But that Congress meant that the Government of the United States should become a tax collector for a territorial county, and should execute this office by breaking a treaty with a foreign power, is not to be inferred from language which will bear any other interpretation.

If it were intended that this money should be withheld for the benefit of Pierce County, Congress would probably have directed that it should be paid the treasury of that county. But no such direction appears in the statute. The provision is, that the amount of such taxes shall be withheld from the appropriation, that is, shall be kept in the Treasury of the United States—a very fit place for taxes assessed by the United States, but not for taxes assessed by Pierce County.

I am not informed whether any United States taxes were in fact assessed upon the property of the company. But it is hardly possible that the company could have had interests of great magnitude within the United States for the last ten years without liability to national taxes; and Congress might have inserted the proviso out of abundant caution, without knowing whether a claim for such taxes existed in fact.

I do not overlook the fact that a Territory is a creation of Congress, and sustains to the General Government a relation different in many respects from that sustained by a State. Nevertheless, its taxes are so different from the taxes of the United States, in the authority which immediately imposes them, in the agencies which collect them, and in the purposes to which they are applied, that Congress cannot reasonably be supposed to have intended to embrace them under the general name "taxes" in such a statute as that under consideration.

I have not examined the questions of the regularity and sufficiency of the certificate from the auditor of Pierce

Restoration of Lands sold for Taxes.

County, of the validity of the county's claim for taxes, or of the validity of the assessed penalty; or whether the taxes, if valid at all constitute a general debt of the company, or bind alone the property once occupied by it and now recognized as belonging to the United States, because the construction which I have felt obliged to put upon the proviso in question makes such examination unnecessary.

I am therefore of the opinion that neither the tax nor the penalty which Pierce County is said to claim from the company should be withheld, and that no taxes should be withheld under the proviso except such as may be found to have been legally assessed upon the property of the company by the Government of the United States.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. HAMILTON FISH,

Secretary of State.

RESTORATION OF LANDS SOLD FOR TAXES.

The Executive has no authority to restore to the former owner certain lands in South Carolina which the United States hold under a title acquired by purchase of the premises at a tax sale under the provisions of the direct-tax law.

DEPARTMENT OF JUSTICE,

August 15, 1871.

SIR: On the 26th of January last you referred to me the petition of Mrs. Anne R. Elliot, widow and executrix of William Elliot, late of Beaufort, South Carolina. She prays for the restoration of certain lands in South Carolina, the property of her testator, which were seized by the United States forces during the late rebellion, and were afterwards, while in possession of said forces, and in the absence of the owner, sold for the payment of the United States land tax, and bought in for the Government. The Government is represented now to hold the lands under the title acquired by this purchase.

It is alleged that the deceased Mr. Elliot and his family have always been loyal to the United States. The counsel

Property Lost in the Military Service.

for Mrs. Elliot urges upon me the consideration that, as the lands in question were in the occupancy of the forces of the United States at the time the tax was imposed, the Government should not have exacted the tax from the absent owner, and, therefore, that the sale for taxes was inequitable. If this be all true, I am not aware of any law which authorizes you to give the desired relief.

Nakedly stated, the case, according to his presentation of it, is this:

The United States has, according to law, acquired property under circumstances which make the acquisition oppressive and unjust to the owner.

While an act of Congress restoring the property might be a piece of most righteous legislation, the Executive cannot restore it unless authorized by law. No such law existing at present, I regret that you are powerless to aid this lady in the premises.

My delay in considering the matter has been at the instance of the counsel for Mrs. Elliot, who wished to submit his views upon it.

Very respectfully, your obedient servant,

A. T. AKERMAN.

The PRESIDENT.

NOTE.—Since the foregoing opinion was given, Congress has passed an act "to provide for the redemption and sale of lands held by the United States under the several acts levying direct taxes," &c. See act of June 8, 1872, (17 Stat., 330.)

PROPERTY LOST IN THE MILITARY SERVICE.

The 2d section of the act of March 3, 1849, providing for payment for certain property lost or destroyed in the military service, is not repealed by the 4th section of the legislative, executive, and judicial appropriation act of July 12, 1870. The repealing clause of the latter section operates exclusively on sections 1 and 7 of the former act.

DEPARTMENT OF JUSTICE,

August 16, 1871.

SIR: Your letter of the 7th instant requests my opinion upon the question whether the 2d section of the act of March

Property Lost in the Military Service.

3, 1849, entitled "An act to provide for the payment of horses and other property lost or destroyed in the military service of the United States," (9 Stat., 415,) is repealed by the 4th section of the act of July 12, 1870, "making appropriations for the legislative, executive, and judicial expenses of the Government for the year ending the 30th of June, 1871." (16 Stat., 250.)

The language of the latter act is "that the appropriation made by the following parts of acts and resolutions be, and the same are hereby, repealed." Then comes a list of sections of various acts, the part of it which follows raising the question : "Sections one and seven of the act of March three, eighteen hundred and forty-nine, being an appropriation to pay for horses, mules, and so forth, lost or destroyed while in the military service."

The 1st section of the act of March 3, 1849, provides for payment of the value of horses and equipage, lost in military service without the fault of the owner, of any officer, mounted militiamen, volunteer, ranger, or cavalryman, in the military service of the United States.

The 7th section provides for paying for horses and equipage, when horses have been condemned by a board of officers on account of unfitness for service produced by the failure of the Government to supply forage.

Section 2 provides for indemnifying the owner of any horse, mule, or wagon, cart, boat, sleigh, or harness, while such property was in the military service of the United States, by impressment or contract, lost or destroyed by unavoidable accident without fault of the owner. (9 Stat., 414.)

Thus it will be seen that what follows the words "being an appropriation," in the above quotation from the act of 1870, is an apter description of section 2 than of sections 1 and 7. But I cannot hold that the appropriation in the 2d section is repealed. If the act of 1870 repealed in terms all parts of the act of 1849, containing appropriations for horses, mules, &c., and then designated such parts as *sections 1 and 7*, section 2 would be repealed, notwithstanding the omission of it in the numerical designation ; for then its matter would be the object of the repealing words, and the addition of a "false demonstration" would not limit their force.

Freedmen's Bureau.

But the grammatical structure of the act is different. The repealing words operate only on the specified sections. What follows purports to describe their contents, but, in fact, better describes section 2. This mistake cannot have the force of repealing section 2, which is as untouched as if it occurred in a different statute.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. GEORGE S. BOUTWELL,

Secretary of the Treasury.

FREEDMEN'S BUREAU.

The Freedmen's Bureau cannot be regarded as an agent or attorney within the meaning of the joint resolution of July 26, 1866, fixing the fees for collecting bounty-claims of colored soldiers, &c., in cases where such claims are collected by it, and therefore cannot retain for the Government the prescribed fees for such service, though the claimants so request.

DEPARTMENT OF JUSTICE,

August 17, 1871.

SIR: The joint resolution of July 26, 1866, (14 Stat., 367, 368,) fixes the fees of agents or attorneys for collecting the bounty to colored soldiers and their wives, widows, or heirs, and provides for the punishment of any agent or attorney who shall charge a greater sum for such services.

Your letter of the 15th instant requests my opinion upon the question, whether the Bureau of Refugees, Freedmen, and Abandoned Lands, when it collects such claims, may retain for the Government the fees thus prescribed, if the claimant so requests.

This cannot be done unless the Bureau comes within the description of *agent* or *attorney*, as those terms are used in the resolution. While in many particulars that Bureau exercises a most humane and beneficial agency for colored persons, I am of opinion that it is not an agent or attorney in the sense of that section. Without stating other grounds for this opinion, it is enough for me to refer you to the latter part of the 2d section, which plainly shows that the resolution con-

Water-Main from Washington Aqueduct.

templates only such agents or attorneys as can perpetrate a misdemeanor, can be subject to trial and conviction, can be punished by fine, and can be forever excluded from prosecuting military or naval claims against the Government.

These capacities and liabilities do not pertain to the Freedmen's Bureau, and therefore I am of the opinion that it cannot retain the fees in question.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. WM W. BELKNAP,
Secretary of War.

WATER-MAIN FROM WASHINGTON AQUEDUCT.

Where the engineer in charge, being required by law to invite proposals by circulars and advertisement for furnishing pipes for a water-main from the Washington Aqueduct in the District of Columbia, and to give the contract to the lowest responsible bidder, issued instructions stating that "no bid will be considered which does not comply with" certain directions, and the lowest bid afterward received failed to comply with those directions in material points: *Held* that the bid cannot be considered.

When the law under which the engineer acts authorizes him to solicit bids by circular, &c., and then requires the contract to be given to the lowest responsible bidder, it must be construed to mean that the lowest responsible bidder who conforms to the terms prescribed in the circular shall have the contract.

DEPARTMENT OF JUSTICE,

August 23, 1871.

SIR: The question raised in the communication from Major George H. Elliot, of the Engineers, transmitted in your letter of the 21st instant, is this: Whether he is authorized to accept the lowest bid for furnishing pipes for a water-main from the Washington Aqueduct through the District of Columbia.

Major Elliot, in this matter, acts under the authority both of Congress and of the legislative assembly of the District of Columbia. The act of the assembly, approved July 20, 1871, entitled, "An act to provide for additional supplies of Potomac water by means of the Washington Aqueduct to the cities of Washington and Georgetown, and authorizing a loan

Water-Main from Washington Aqueduct.

for such purpose," provides in the 12th section that the engineer shall "invite proposals by circulars and newspaper publications," and "that the contracts for supplying the said pipe * * * shall in all cases be given to the lowest responsible bidders." The engineer has issued his circulars inviting proposals, and has inserted advertisements in the newspapers referring to his circulars. The circular contains instructions to bidders, the first of which is as follows: "No bid will be considered which is not made on the printed form, and which does not comply with the following directions."

The lowest bid which has been made does not comply with the directions in certain material points. I do not think that it can be considered. If the call for bids were not required by law, but were simply a convenient mode adopted by the engineer for finding a suitable contractor, the reasons for insisting upon a strict conformity to the instructions to bidders might be weaker than they are in the present case. But when the law, under which Major Elliot acts, authorizes him to invite proposals by circulars and newspaper publications, and then requires that the contract shall, in all cases, be given to the lowest responsible bidder, it must be construed to mean that the lowest responsible bidder, who conforms to the terms prescribed in the circular, shall have the contract. It is a mockery to invite proposals of a certain sort, and then to reject them for proposals of a different sort, which were uninvited, and the possible acceptance of which could not have been generally anticipated. And, although cases may occur in which a rigid adherence to the advertised terms will be inconvenient and disadvantageous to the Government in the particular case in hand, yet a loose practice in such matters will, in the end, work to the serious disadvantage of the Government.

The authority to invite proposals implies an authority to prescribe reasonable terms and conditions. To announce under this authority that no bid will be considered which does not comply with certain directions, and afterward to consider and accept a bid not complying with such directions, is unjust to the complying bidders.

I am aware that the rigid rule which I advise has not always been observed, and that authority for a somewhat flexi-

First Deputy Commissioner of Internal Revenue.

ble practice in the matter of bids may be found in opinions of my predecessors. But I can see no propriety in announcing terms unless they are to be insisted on; and when, as in this case, they are authorized by law, I think that the officer or public agent who prescribes them is not at liberty to disregard them, and that he should consider that person the lowest bidder who makes the lowest bid according to the prescribed forms and terms.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. Wm. W. BELKNAP,

Secretary of War.

FIRST DEPUTY COMMISSIONER OF INTERNAL REVENUE.

The suspension of the Commissioner of Internal Revenue under the tenure of office act of April 5, 1869, and the designation by the President of the First Deputy Commissioner of Internal Revenue to perform the duties of the suspended officer, did not vacate the office of First Deputy Commissioner; but the latter is entitled, as long as he performs the Commissioner's duties under the President's designation, to the salary of the Commissioner only.

DEPARTMENT OF JUSTICE,

August 25, 1871.

SIR: Your letter of the 23d instant requests my opinion upon the question whether there is a *vacancy* in the office of First Deputy Comissioner of Internal Revenue.

The facts of the case I understand to be these: that Mr. Pleasonton, the Commissioner of Internal Revenue, has been suspended by the President under the tenure of office act of April 5, 1869, (16 Stat., 7,) and that Mr. Douglass, the First Deputy Commissioner, has been designated by the President to perform the duties of the suspended officer. Does this designation vacate the office of Mr. Douglass as Deputy Commissioner?

The holder of an office vacates it by the acceptance of another incompatible office. He does not vacate it by temporarily performing the duties of another office when such temporary performance is permitted by law.

First Deputy Commissioner of Internal Revenue.

Under the tenure of office acts, Mr. Pleasanton is still Commissioner of Internal Revenue, because his term has not expired, and he has not been removed by and with the advice and consent of the Senate, or by the appointment, with the like advice and consent, of a successor in his place. Attorney General Hoar, in an opinion dated April 2, 1870, (ante, p. 221,) uses this language in reference to these acts: "The word 'suspended' imports that the person suspended is still the incumbent of the office, that the interruption of his performance of its duties is temporary and provisional."

The 2d section of the act of April 5, 1869, in its direction to the President on the subject of nominations at the commencement of each session of the Senate, clearly distinguishes between offices that are vacant, and offices the incumbents of which are suspended. The commissionership of internal revenue is in the latter category. Mr. Pleasanton is the Commissioner. By temporary appointment to perform the Commissioner's duties, Mr. Douglass does not acquire the office of Commissioner, though by special provision of the tenure of office act he becomes entitled to the salary and emoluments of the Commissioner while he performs the duties of that office.

The question, then, recurs, whether the Deputy Commissioner can, without vacating his own office, receive a designation to perform the duties of the Commissioner. The internal-revenue act of March 3, 1863, in section 19, provided for the appointment of the Deputy Commissioner, and prescribed among his duties that of "acting as Commissioner of Internal Revenue in the absence of that officer," (12 Stat., 725-726.) The same duty is re-enacted in the 3d section of the act of June 30, 1864, (13 Stat., 224.) The duty thus prescribed is again recognized by the 64th section of the internal revenue act of July 13, 1866, (14 Stat., 170.) Thus it appears to have been specially made the duty of the Deputy Commissioner to act as Commissioner in the absence of that officer.

The act of July 23, 1868, "to authorize the temporary supplying of vacancies in the Executive Departments," provides, in the 2d section, that "in case of the death, resignation, absence, or sickness of the chief of any Bureau, or of any officer thereof, * * * the deputy of such chief or of such

Naval Courts-Martial.

officer * * * shall, unless otherwise directed by the President, * * * perform the duties of such chief or of such officer until a successor shall be appointed, or until such absence or sickness shall cease." The 3d section of the same act prohibits the officer so performing the duties of his chief from receiving extra compensation for such service.

From these citations, it is apparent that the law, both in its general and in its special provisions, not only permits but requires the Deputy Commissioner to act as Chief Commissioner in certain cases, and that he does not lose his own office by such substitution. If Mr. Douglass would not have vacated the Deputy Commissionership by acting as Commissioner in case of the absence, resignation, or death of Mr. Pleasonton, he does not vacate the office by acting as Commissioner under the President's designation during the suspension of Mr. Pleasonton. The tenure of office act of April 5, 1869, entitles him, under such designation, to the salary of Mr. Pleasonton, which he could not have received if acting as Commissioner under the previous statutes above cited. The act of the 30th of September, 1850, (9 Stat., 542, 543,) prohibits the allowance to one individual of the salaries of two different offices on account of having performed the duties thereof at the same time.

The conclusion is that Mr. Douglass is still First Deputy Commissioner, but is entitled, as long as he performs the Commissioner's duties under the President's designation, to the salary of the Commissioner only.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. GEORGE S. BOUTWELL,

Secretary of the Treasury.

NAVAL COURTS-MARTIAL.

According to the law regulating courts-martial, the judge-advocate is the official prosecutor; and, in cases arising in the Navy, he is by custom either a naval officer specially designated, or a lawyer employed for that purpose.

But, by force of section 17 of the act of June 22, 1870, establishing the Department of Justice, where the case before the court-martial is of such a character as to render it expedient that the proceeding be con-

Naval Courts-Martial.

ducted by a lawyer, the Secretary of the Navy is not at liberty to employ counsel, but should call upon the Department of Justice to supply an officer for the service.

DEPARTMENT OF JUSTICE,

August 25, 1871.

SIR: You have been requested by a resolution of the House of Representatives to institute proceedings, by court-martial, against Rear-Admirals S. W. Godon and C. H. Davis, on account of matters in connection with their actions as commandants of the South Atlantic fleet; and you have requested my opinion upon the question whether the Navy Department is authorized by law to appoint any persons whom it may select to conduct either or both of said cases.

According to the law regulating courts-martial, the judge-advocate is the official prosecutor; and, in cases arising in the Navy, he is by custom either a naval officer specially designated, or a counsellor-at-law employed for that purpose. If a naval officer, he receives no special compensation. If a counsellor-at-law, it has been the custom to pay him as for a professional service. Section 17 of the act of June 22, 1870, to establish the Department of Justice, prohibits the Secretary of any of the Executive Departments from employing attorneys or counsel at the expense of the United States.

Considering it settled that the services in question are such as can be properly performed only by a naval officer or a counsellor-at-law, I am of the opinion that if, in your judgment, the cases in hand should be conducted by a person of the latter description, you are not at liberty to employ such counsel, but should call upon the Department of Justice, which will furnish you with an officer for the service.

This conclusion is confirmed by the fact that the 3d section of said act transfers from the Navy Department to the Department of Justice the officer once known as the Solicitor and Naval Judge-Advocate-General. His title is changed by said section to that of Naval Solicitor, but his functions are unchanged, and it is expressly provided that he, and other transferred officers, shall exercise their functions under the supervision and control of the head of the Department of Justice. Though the functions of that officer are nowhere distinctly defined by statute, yet the very name of the office

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indicates that he was generally charged with such duties as a judge-advocate performs.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. G. M. ROBESON,

Secretary of the Navy.

CIVIL-SERVICE COMMISSION.

The power of appointment conferred by the Constitution is a substantial and not merely a nominal function, and the judgment and will of the constitutional depositary of that power should alone be exercised or have legal operation in filling offices created by law.

The right of Congress to prescribe qualifications for office is limited by the necessity of leaving scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment.

Congress may, at its pleasure, distribute the appointment of inferior officers between the President, courts of law, and heads of Departments, or confide the same exclusively to one or more of these depositaries; but it cannot constitutionally vest such appointment elsewhere, directly or indirectly.

Accordingly, an act requiring the President, the courts, and heads of Departments to appoint to office the persons designated by an examining board as the fittest would be at variance with the Constitution, inasmuch as it would virtually place the power of appointment in that board.

But though the result of an examination before such a board cannot be made legally conclusive upon the appointing power, against its own judgment and will, yet it may be resorted to in order to inform the conscience of that power.

And notwithstanding that the appointing power alone can designate an individual for an office, still, either Congress, by direct legislation, or the President, by authority derived from Congress, can prescribe qualifications, and require that the designation shall be out of a class of persons ascertained by proper tests to have those qualifications.

DEPARTMENT OF JUSTICE,

August 31, 1871.

SIR: You have called for my opinion upon certain questions presented by the body known as the civil-service commission.

That commission has been appointed under the 9th section of the act of March 3, 1871, making appropriations for sundry

Civil-Service Commission.

civil expenses of the Government for the year ending June 30, 1872, and for other purposes, which is as follows:

"That the President of the United States be, and he is hereby, authorized to prescribe such rules and regulations for the admission of persons into the civil service of the United States as will best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose the President is authorized to employ suitable persons to conduct said inquiries, to prescribe their duties, and to establish regulations for the conduct of persons who may receive appointments in the civil service," (16 Stat., 514.)

The commission had under consideration the following resolution:

"Resolved, That we recommend to the President that all admissions to the civil service of the United States, with such exceptions as may be specified, shall be determined by a competitive examination, open to all applicants who shall have satisfied such preliminary examination in regard to health, age, character, and other qualifications, excepting political and religious opinions, as may be required."

The objection was made that the designation of a single person for appointment by a board not established by the constitutional appointing power would virtually vest the appointment in a body unknown to the Constitution. My opinion is asked upon the validity of this objection.

I suppose that the inquiry relates only to those public employments known as offices; for no one could seriously contend that there is a constitutional limit to the discretion of Congress in prescribing the terms of admission to such public employments as do not come within this description. I suppose, also, that the phrase *civil service* is used in distinction from the military and naval service.

The objection is substantially this: that a rule, whether prescribed by Congress, or by the President in pursuance of authority given by Congress, that a vacant civil office must be given to the person who is found to stand foremost in a competitive examination, in effect makes the judges in that examination the appointing power to that office, and thus

Civil-Service Commission.

contravenes the constitutional provisions on the subject of appointments.

The civil officers with reference to whom this question should be considered are these: the officers (except the Speaker) of the House of Representatives, the officers (except the President *pro tempore*) of the Senate—these by Article II of the Constitution, sections 2 and 3, are to be chosen by the bodies which they serve—ambassadors, other public ministers and consuls, and judges of the Supreme Court, who are appointed by the President after nomination to the Senate, and with the advice and consent of that body; and all other officers of the United States who are to be appointed by the President under the same conditions, except inferior officers, who, when Congress thinks proper, may be appointed by the President alone, the courts of law, or the heads of Departments. (Art. II, sec. 2.) It was the opinion of Chief-Justice Marshall that these provisions covered all the offices of the United States, (*Maurice vs. The United States*, 2 Brockenhough's Rep., p. 101.) And these provisions must be construed as excluding all other modes of appointment. The Senate and House of Representatives are to "choose" their respective officers. The President, (with or without the consent of the Senate,) the courts of law, and the heads of Departments "appoint" all the other officers. These words *choose* and *appoint*, as used in the Constitution, are of the same signification.

Confining my attention, for the sake of brevity, to the latter word, I ask, what does it mean? If to appoint is merely to do a formal act, that is, merely to authenticate a selection not made by the appointing power, then there is no constitutional objection to the designation of officers by a competitive examination, or any other mode of selection which Congress may prescribe or authorize. But if appointment implies an exercise of judgment and will, the officer must be selected according to the judgment and will of the person or body in whom the appointing power is vested by the Constitution, and a mode of selection which gives no room for the exercise of that judgment and will is inadmissible. If the President in appointing a marshal, if the Senate in appointing its Secretary, if a court or head of Department in appoint-

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ing a clerk, must take the individual whom a civil-service board adjudge to have proved himself the fittest by the test of a competitive examination, the will and judgment which determine that appointment are not the will and judgment of the President, of the Senate, of the court, or of the head of Department, but are the will and judgment of the civil-service board, and that board is virtually the appointing power. Viewing the appointing power conferred in the Constitution as a substantial and not merely a nominal function, I cannot but believe that the judgment and will of the constitutional depositary of that power should be exercised in every appointment. The power was lodged where it is, because the makers of the Constitution, after careful consideration, thought that in no other depositaries of it could the judgment and the will to make proper appointments so certainly be found. They assigned it to functionaries who were expected to have an adequate knowledge of men and of affairs, to have capacity for public business, and to feel responsible to conscience and to the opinion of good citizens. As a further security, they placed the power in the hands of those who would have a particular interest in using it well. If a legislative body is ill-officered, the members cannot do their work with ease or advantage; therefore each branch of Congress chooses its officers. Without efficient servitors, a court of law is impotent; therefore Congress may vest appointments in courts. The first need of the head of a Department is a body of capable and trusty assistants; therefore Congress may vest appointments in the heads of Departments. In all cases not thus provided for, the appointment is with the President, whose success in his weighty charge essentially depends on the competency of the appointees. Thus the reasons for the constitutional provision all forbid that any judgment and will but those of the constitutional appointing power should have legal operation in the matter of appointment.

The most important civil appointments are made by the President, with the advice and consent of the Senate. If Congress can compel the President to nominate a person selected by others, it can compel the Senate to advise and consent to that nomination. If the foremost man in the competitive test is entitled to the office, that test must be con-

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clusive upon all whose action is required to place him in the office, and, in fact, the action of all of them is merely formal, except that of the judges in the test. But advice and consent imply an exercise of judgment and will. So does nomination. So does appointment. There is this difference, that the judgment and will of the Senate can regard only the person proposed by the President, while there is no similar constitutional limitation upon his judgment and will. But there is no right in Congress to constrain either to adopt the judgment and the will of others. Such constraint frustrates the constitutional design, that the judgment of the Senate shall revise the judgment of the President, and that the judgment of both shall concur in filling the office. Although it might not be thought expedient to apply the competitive test, if established, to appointments in which the Senate must concur, it should be remembered that there is as much constitutional right to do so as in the case of appointments of the other class. When the appointment of an inferior officer is vested in the President alone, his individual act accomplishes what is done by himself and the Senate together in the appointment of a superior officer, and should be as independently performed as each part of the compound process in the latter case.

The appointing power may avail itself of the judgment of others as one means of information. For want of personal knowledge of candidates, it has habitually done so from the foundation of the Government. But this has been done in its discretion. I see no constitutional objection to an examining board, rendering no imperative judgments, but only aiding the appointing power with information. A legal obligation to follow the judgment of such a board is inconsistent with the constitutional independence of the appointing power.

The argument has been made that the unquestioned right of Congress to create offices implies a right to prescribe qualifications for them. This is admitted. But this right to prescribe qualifications is limited by the necessity of leaving scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment. The parts of the Constitution which confer this power are as valid as those parts from which Congress derives the power to

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create offices, and one part should not be sacrificed to the other. An office cannot be created except under the condition that it shall be filled according to the constitutional rule.

The legislation of the country from an early period has been supposed to authorize a different constitutional view from that which is herein expressed. "A practical construction of the Constitution by Congress," says the Supreme Court, in *Veazie Bank vs. Feno*, 8 Wallace Reports, 544, "is entitled to great consideration, and should be followed in all cases of doubt." But when a congressional construction is inconsistent with the plain meaning of the Constitution, as ascertained by authoritative canons, that meaning cannot be overruled by such construction, how often soever repeated.

Congress has, at various times, authorized appointments independently of the President, courts of law, or heads of Departments, in departmental Bureaus, in the customs service, in the internal-revenue service, in the land-offices, and in some other branches of the civil service. Upon this legislation it may be observed: First, that in some of these cases, such as those of deputy marshals and deputy clerks, the persons appointed are representatives of the officers who appoint them, and who, in some particulars, are responsible for their conduct, and, perhaps, it was considered by Congress that the office was substantially in the principal. Second, that it was, no doubt, considered by Congress that some of the persons whose appointments were thus provided for were not officers in the constitutional sense of the term. Many employments now universally held to be offices were not esteemed such at the outset, but with the growth of the Government were raised to that rank.

Thus, the force of legislative precedents is somewhat weakened. Yet, it cannot be denied that some of them take for granted that Congress is absolute in the matter of appointments. Such, however, is not the constitutional rule. Congress has power to distribute at its pleasure the appointment of inferior officers between the President, courts of law, and heads of Departments, or to vest such appointments exclusively in one or two of those depositaries; but it has no power to vest appointments elsewhere, directly or indirectly. Attorney-General Legaré says: "Congress has no power

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whatever to vest the appointment of any employé coming fairly within the definition of an inferior officer of the Government in any other public authority but the President, the heads of Departments, or the judicial tribunals," (4 Opins., 164.) He also was of opinion that where a customs officer is appointable by the collector, with the approbation of the Secretary of the Treasury, this approbation is really the appointment, or else the appointment "is null and void under the Constitution." (*Ibid.*, 164, 166.) So the Supreme Court has held that a clerk appointed by the Assistant Treasurer, with the approbation of the Secretary of the Treasury, was "appointed by the head of the Department within the meaning of the constitutional provision on the subject of the appointing power." (*United States vs. Hartwell*, 6 Wallace, 393, 394.) Attorney-General Speed thought that a provision in the internal-revenue act of March 3, 1865, giving to assessors the appointment of assistant assessors, (13 Stat., 469,) was "clearly unconstitutional," (11 Opins., 212.) And such appears to have been the opinion of Congress itself when its attention was called to the subject, for the act of January 15, 1866, repealed that provision, and gave the appointment of assistant assessors to the Secretary of the Treasury, (14 Stat., 2.)

I have not discussed the statutes relating to promotions in the Army and Navy, and the appointment of cadets. Some of the provisions of those statutes have been seriously assailed as unconstitutional, and the defense of them has been less frequently rested on the clauses in the Constitution on the subject of appointments than on the power of Congress "to make rules for the government and regulation of the land and naval forces." (See report of Senate Committee on Military Affairs, April 25, 1822, Niles's Register, vol. 22, p. 418; debate on civil service in House of Representatives, May, 1870.) Unless controlled by authority, I should not take this power to embrace the subject of appointments, and I only refer to it for the purpose of showing that the claim made for Congress in relation to military and naval appointments has been put on grounds not applicable to civil appointments.

It more concerns us to ascertain what is the constitutional rule than to learn whether that rule has always been observed.

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Nineteen violations of the Constitution do not justify a twentieth. The present question, in its essence, is whether the appointing power belongs to Congress, or to those named in the Constitution as the depositaries of that power; for, if Congress can ordain that an office shall be filled by the person whom the examiners pronounce the fittest, it can ordain that the office shall be filled by the person whom Congress judges the fittest, and may directly appoint its favorite. The constitutional aspect of the matter is not changed by the suggestion that Congress might prescribe the principles on which the examiners should judge; for it might prescribe the principles on which itself should judge, and might vary and apply them at pleasure. The objections would not be removed by interposing the formal action of the constitutional appointing power. An enactment that the President shall appoint to a certain office the person adjudged by the examiners to be the fittest, is not different in constitutional principle from an enactment that he shall appoint John Doe to that office. In neither case are his judgment and will called into exercise. The appointment is effected in one case by the judgment and will of the examiners, under authority from Congress, and in the other case by the judgment and will of Congress.

In the cases particularly propounded by the commission, if the President, authorized by an act of Congress, should prescribe that the courts and heads of Departments should always appoint the persons named by a civil-service board, that board would virtually be the appointing power, and that act of Congress would be the foundation of its authority. That Congress cannot give such authority, I think is manifest.

It has been suggested that the appointments now vested in the courts and in the heads of Departments could be transferred by Congress to the President, and that he could appoint according to the result of a competitive test, certified by an examining board. To this mode of selection, if discretionary with the President, there is no constitutional objection, and the same mode under a similar condition could be used by the various appointing powers under present laws; it being always understood that the appointing power resorts to this test as a way of finding out the fittest

Civil-Service Commission.

person for the vacant office, and is not bound to abide by it, if satisfied that the appointment of another would best serve the public interests. In short, the test of a competitive examination may be resorted to in order to inform the conscience of the appointing power, but cannot be made legally conclusive upon that power against its own judgment and will.

The other question proposed by the commissioners is this : " May the President, under the act by which this board is organized, regulate the exercise of the appointing power now vested in the heads of Departments, or in the courts of law, so as to restrict appointments to a class of persons whose qualifications or fitness shall have been determined by an examination instituted independent of the appointing power?" My opinion is that he may. Though the appointing power alone can designate an individual for an office, either Congress, by direct legislation, or the President, by authority derived from Congress, can prescribe qualifications, and require that the designation shall be made out of a class of persons ascertained by proper tests to have those qualifications; and it is not necessary that the judges in the tests should be chosen by the appointing power. Attorney-General Legaré has given an opinion upon a question similar in principle. Discussing the subject of appointment of inspectors of customs by the Secretary of the Treasury, he considers that it would " be a fair constitutional exercise of the power of Congress to require that the Secretary should make an appointment out of a certain number of nominees proposed by a collector," (4 Opins., 164.) The act under which the present civil-service commission has been organized gives the President authority " to prescribe such rules and regulations for the admission of persons into the civil service of the United States as will best promote the efficiency thereof," and this very ample authority will certainly embrace the right to require that the persons admitted into the service shall have been found qualified by competent examiners.

It has been argued that a right in Congress to limit in the least the field of selection, implies a right to carry on the contracting process to the designation of a particular individual. But I do not think this a fair conclusion. Congress

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could require that officers shall be of American citizenship or of a certain age, that judges should be of the legal profession and of a certain standing in the profession, and still leave room to the appointing power for the exercise of its own judgment and will; and I am not prepared to affirm that to go further, and require that the selection shall be made from persons found by an examining board to be qualified in such particulars as diligence, scholarship, integrity, good manners, and attachment to the Government, would impose an unconstitutional limitation on the appointing power. It would still have a reasonable scope for its own judgment and will. But it may be asked, at what point must the contracting process stop? I confess my inability to answer. But the difficulty of drawing a line between such limitations as are, and such as are not, allowed by the Constitution, is no proof that both classes do not exist. In constitutional and legal inquiries, right or wrong is often a question of degree. Yet it is impossible to tell precisely where in the scale right ceases and wrong begins. Questions of excessive bail, cruel punishments, excessive damages, and reasonable doubts are familiar instances. In the matter now in question, it is not supposable that Congress or the President would require of candidates for office qualifications unattainable by a sufficient number to afford ample room for choice.

Very respectfully, your obedient servant,

A. T. AKERMAN.

The PRESIDENT.

COMPROMISE OF INTERNAL-REVENUE CASES.

The provision in section 179 of the act of June 30, 1864, as amended by the act of July 13, 1866, for compromising internal-revenue cases, is repealed by section 102 of the act of July 20, 1868.

DEPARTMENT OF JUSTICE,

September 6, 1871.

SIR: In a letter addressed to the Secretary of the Treasury on the 27th of July last, I expressed the opinion that the compromising of judgments founded on internal-revenue cases

Court-Martial Service.—Traveling Allowances.

is not authorized by section 102 of the internal-revenue act of July 20, 1868, (15 Stat., 166.)

Your letter of the 30th ultimo inquires if the provision for compromising internal-revenue cases in section 179 of the act of June 30, 1864, as amended by the act of July 13, 1866, (14 Stat., 146,) is still in force, and if it authorizes compromises of such judgments.

I think it is not in force. It was completely repealed by section 102 of the act of July 20, 1868. The latter section covers all the ground of the former, with a material change in the regulations, and the two, therefore, cannot stand together.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. J. F. HARTLEY,

Acting Secretary of the Treasury.

COURT-MARTIAL SERVICE.—TRAVELING ALLOWANCES.

An officer of the Army, while on leave of absence from his command, in October, 1870, was ordered to serve and did serve on a court-martial; and the court, having adjourned *sine die* before the expiration of his leave, he immediately returned to his command: *Held*, 1st, that the officer is not entitled to *per diem* compensation for his service on the court-martial, such allowance being prohibited by the act of July 15, 1870; and, 2d, that he is not entitled to mileage from the place where the court met to the place where his command was stationed, as at the time he was not "an officer traveling under orders," and not within the provisions of the 24th section of that act allowing mileage.

Paragraph 900 of the Army Regulations applies to officers who, at the adjournment of the court, should be at post or duty but for the engagement at court, and not to officers who, for the time being, (as is the case with officers on leave,) have no such post or duty.

DEPARTMENT OF JUSTICE,

September 9, 1871.

SIR: From the papers transmitted to me with your communication of the 1st instant, it appears that Lieutenant-Colonel Thomas C. Devin, Eighth Cavalry, had leave of absence from his command from May 24th until November 1st, 1870; that while thus absent, to wit, in October, 1870, he was

Court-Martial Service.—Traveling Allowances.

ordered to serve on a court-martial convened at West Point; that the court-martial adjourned without day prior to the expiration of his leave; and that he immediately returned to his command at Leavenworth.

Upon these facts two questions arise:

First. Is Lieutenant-Colonel Devin entitled to a *per diem* compensation for his service as a member of the court-martial?

Second. Is he entitled to mileage for his return journey from West Point to Leavenworth?

I am of opinion that he is not entitled to *per diem* compensation for his service on the court-martial. The act of July 15, 1870, prohibits "all allowances of every name and nature whatever," except such as are authorized by that act, (16 Stat., 320.) This allowance, not being so authorized, is prohibited. This law was of force as soon as approved by the President, and the omission to promulgate it by Army orders until several months thereafter will not prevent it from having effect.

Upon the other question, I am of the opinion that his claim to mileage from West Point to Leavenworth is not well founded. He relies on paragraph 900 of the Army Regulations, to wit: "When a court-martial or court of inquiry adjourns without day, the members will return to their respective posts and duties, unless otherwise ordered." I think that this paragraph can only be applicable to officers who, at the adjournment of the court-martial, should be at post or duty but for the engagement at the court, and not to officers who have no such post or duty. And the latter is the case, for the time being, of an officer on leave. If Colonel Devin's service on the court-martial had been rendered in the first month of his five months' leave, it cannot be supposed that paragraph 900 would have terminated his leave and have sent him back to his post. Indeed, I am informed that the rule in the Army is, that when an officer on leave of absence is subjected to duty on court-martial, and the court adjourns prior to the termination of his leave, he is considered as still on leave up to the time originally prescribed for its termination, and, in fact, the loss of time upon the court-martial is usually made up to him by an extension of the leave. At the adjournment of the court, then,

Priorty of United States.

Colonel Devin was not under orders to return to his post at Leavenworth, (either special orders or the standing order in paragraph 900 of the Regulations,) and does not fall within the description of "an officer traveling under orders," to whom mileage may be allowed under section 24 of the act of July 15, 1870, above referred to. If an officer's service on court-martial operated as an absolute revocation of an existing leave of absence, I should probably come to a different conclusion upon this point. But, under the usages of the Army as they have been reported to me, he reverted to his condition of absent on leave immediately upon the adjournment of the court-martial without day. And I understand it to be one of the implied conditions of leave of absence that the favored officer shall not subject the Government to any expense on account of leave.

In justice to the officer, I think that though he ought not to be relieved by the service on court-martial under such circumstances of the private expenses properly attendant upon his leave of absence, yet he ought not to incur additional private expense on account of that service, and, therefore, in every such case, he should receive orders for travel for such distance from the place where the court sits as will put him in the same circumstances, as to expense, as if the service on court-martial had not been required of him.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. WM. W. BELKNAP,

Secretary of War.

PRIORITY OF UNITED STATES.

The United States have no priority over private creditors in the assets of an insolvent national bank for payment of deposits made in such bank to the respective credit of the United States Treasurer, of a United States disbursing-officer, and of the registry of a United States district court, after the fund which may be realized from the bonds held by the United States as a security for such deposits is exhausted.

DEPARTMENT OF JUSTICE,

September 9, 1871.

SIR: Your letter of the 19th ultimo, states that, "In May,

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1867, the First National Bank of New Orleans, Louisiana, became insolvent, and its affairs passed into the hands of a receiver. At that time it was a depositary of public moneys, and, in addition to a large amount of private deposits, held a large balance to the credit of the United States Treasurer, a large amount belonging to the registry of the United States district court, arising from cases in which the United States had an interest, and a small amount to the credit of a certain disbursing-officer of the United States. As security for the circulating notes of the bank, the Government held the required amount of United States bonds, and, in addition, it held at the time of the insolvency \$250,000 in United States bonds as security for public deposits, which amount is more than sufficient to satisfy the loss of the balance standing to the credit of the United States Treasurer, but is not sufficient to cover the loss of the money belonging to the registry of the court and to the United States disbursing-officer which the bank held at that time."

Upon these facts you propound the following questions:

First. "Has the Government a right to priority of payment as against private creditors of this bank, for the moneys which the bank held as above, to the respective credits of the United States Treasurer, a United States disbursing-officer, and the registry of the court, or to either of them, over and above the amount which may be realized from the bonds held as security for deposits?"

Second. "Has the Comptroller of the Currency any lawful authority to declare a dividend to the private creditors of said bank before the claims of the United States of all kinds are first satisfied?"

Under the act of March 3, 1797, section 5, (1 Stat., 515,) the Government has a priority out of the effects of an insolvent debtor, and this has been held applicable to insolvent corporations indebted to the Government. I should think that this priority would exist as to all debts due to the Government from an insolvent national bank but for certain provisions in the national currency act.

The 47th section of the national currency act of June 3, 1864, (13 Stat., 114,) contains this provision: "And for any deficiency in the proceeds of the bonds pledged by such asso-

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ciation, when disposed of as hereinafter specified, to reimburse to the United States the amount so expended in paying the circulating notes of such association, the United States shall have a first and paramount lien upon all the assets of such association, and such deficiency shall be made good out of such assets in preference to any and all other claims whatsoever, except the necessary costs and expenses of administering the same." If Congress had intended that the priority established in section 5 of the act of 1797 should be applicable to the case of insolvent national banks, this provision would have been superfluous. But this careful provision for priority in a certain case shows that Congress did not design that the priority should exist as to debts not thus specially secured.

The 50th section of the same act (page 115) requires that the Comptroller, "after full provision shall have been first made for refunding to the United States any such deficiency in redeeming the notes of such association as is mentioned in this act, shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction." No preference is here given to the United States as a creditor, except for a particular kind of debt, and the direction to divide ratably must be held to put the United States, except as to the privileged class of debts, on the same footing with all other creditors.

I therefore answer your first question in the negative, and your second in the affirmative.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. GEORGE S. BOUTWELL,

Secretary of the Treasury.

Lands of the Kansas Indians.

ATTORNEY-GENERAL.

The opinion of the Attorney-General may be required on questions of law arising in the actual administration of the Departments, but not upon hypothetical cases merely.

DEPARTMENT OF JUSTICE,

September 9, 1871.

SIR: Your letter of June 20th last, propounding certain questions in relation to the employment of attorneys and counsel by heads of Departments, has been carefully considered.

Some of the views expressed by you, and in relation to which you desire my concurrence or dissent, as the case may be, are upon cases so hypothetical that I do not feel at liberty to attempt a distinct answer. It is on questions of law arising in the actual administration of the Departments that the opinion of the Attorney-General may be required. You will readily perceive the inconveniences of giving, upon a hypothetical case, an opinion, which, upon the consideration of an actual case, might require modification on account of circumstances not imagined, and, therefore, not considered in the preparation of the opinion.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. GEORGE S. BOUTWELL,

Secretary of the Treasury.

LANDS OF THE KANSAS INDIANS.

The 4th article of the treaty with the Kansas Indians, (12 Stat., 1112,) which provides for a sale of the lands therein mentioned in parcels not exceeding 160 acres each to the highest bidder for cash, evidently means that each parcel must be sold to the person making the highest bid for that particular parcel.

A bid made upon condition that the whole of the lands shall be awarded to the bidder, there being higher bids from other parties for part of the

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lands, cannot properly be accepted with such condition; as, under the circumstances, this would be, in effect, a sale of the land in the aggregate and not in parcels, and would defeat the plain purpose of the treaty.

DEPARTMENT OF JUSTICE,

September 18, 1871.

SIR: In your letter of the 15th instant you state the following case for my opinion:

"By the 4th article of the treaty with the Kansas Indians, (12 Stat., 1112,) it was provided that certain lands belonging to said Indians should be sold, 'under the direction of the Secretary of the Interior, in parcels not exceeding 160 acres each, to the highest bidder for cash, the sale to be made upon sealed proposals, to be duly invited by public advertisement.' Due notice was given, and in the notice 'the right to reject any and all bids' was expressly reserved.

"At the sale Messrs. Smith & Van Doren bid for each quarter section offered, and each tract less than a quarter section, the sum of two dollars per acre for the trust lands, and four dollars per acre for the diminished reserve. Their entire bid amounts to \$449,532.30. It contains this qualification, that it 'is made upon the condition that the whole of said lands shall be awarded to us.'

"Other bids were made for some of the lands at higher rates than two dollars per acre for the trust lands and four dollars for the diminished reserve. The aggregate amount of all the other bids is \$274,665.28. Some of the lands were not bid for. It is the opinion of this Department that the bid of Messrs. Smith & Van Doren largely exceeds the amount that will be realized from the bids already made, and those that would be made, for the remainder of the lands, and that the pecuniary interest of the Indians will be promoted by accepting said bid."

On this case you ask the following question: "Should the bid of Messrs. Smith & Van Doren be accepted, and the lands awarded to them?"

The language of the treaty, so far as the same relates to the manner and terms of sale of "lands embraced in that portion not stipulated to be retained and divided," is plain

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and unambiguous. The fourth article of the treaty provides that such lands "shall be sold under the direction of the Secretary of the Interior, in parcels not exceeding one hundred and sixty acres each, to the highest bidder for cash, the sale to be made upon sealed proposals, to be duly invited by public advertisement." And it is further provided in the same article, that "should any of the tracts so to be sold have upon them improvements of any kind, which were made by or for the Indians, or for Government purposes, the proposals therefor must state the price for both the land and improvements."

No argument is necessary to prove that it was the intention of the parties to this treaty that the land should be sold *in parcels*, and that such parcels were not to exceed one hundred and sixty acres. What motives led to this determination, or whether the interest of one of the contracting parties might not be better subserved by another mode of sale, are questions not to be considered in arriving at the meaning of language otherwise clear. When the language of a law is explicit and involved in no obscurity, there is no room for construction, and hence no occasion to look beyond the letter of the law itself for its meaning and purpose. By the provisions of this article of the treaty, not only is the land to be sold "in parcels not exceeding one hundred and sixty acres each," but it must be sold "to the highest bidder for cash." The evident meaning of these provisions, taken together, is, that each "parcel" must be sold to the person making the highest bid for that particular parcel. Otherwise the purpose of a sale by parcels would be defeated. There is nothing in the treaty to forbid the purchase by one person of any number of parcels, or, indeed, the whole number; but he can only purchase it "in parcels not exceeding one hundred and sixty acres each," and he becomes entitled to any particular parcel only when he has become the highest bidder for it. He cannot claim or receive title to any one parcel against a higher bidder on the ground that he had made the highest or even the only bid for other parcels. In bidding for each tract he must compete with every other bidder. The acceptance of the bid of Messrs. Smith & Van Doren, under the circumstances named in your letter, would be, in effect, a

Transportation of the Mails.

sale of the land in aggregate and not in parcels, and would defeat the plain language of the treaty.

I therefore answer your question in the negative.

Very respectfully, your obedient servant,

B. H. BRISTOW,

Solicitor-General, and Acting Attorney-General.

Hon. B. R. COWEN,

Acting Secretary of the Interior.

TRANSPORTATION OF THE MAILS.

A check or draft drawn upon a national bank by a party offering proposals to transport the mails, to whom the bank has issued a letter of credit covering the amount of the check or draft, and deposited with the Postmaster-General accompanied by the letter, is a sufficient compliance, to the extent of such amount, with the requirement of section 4 of the act of March 3, 1871.

DEPARTMENT OF JUSTICE,

October 18, 1871.

SIR : In your letter of the 17th instant you state the following case for my opinion :

"J. T. Chidester, of Little Rock, Arkansas, files in this Department a letter of credit from the Merchants' National Bank, of Little Rock, a designated depositary and financial agent of the United States, setting forth that he is authorized to draw on said bank at sight, in sums to suit his convenience, amounting in the aggregate to ten thousand dollars, each and every draft to be indorsed on said letter. He states, verbally, that his design is to submit proposals for the transportation of mails on certain routes, and to accompany each of such proposals, where it exceeds five thousand dollars, with a check or draft on said bank, payable to the order of the Postmaster-General, as a forfeit in case of his failure, on being awarded contracts under his proposals, to enter into good and sufficient bonds to carry out such contracts.

" You will please state whether, in your opinion, the letter of credit so filed in this Department can be considered a certification of such drafts or checks as Mr. Chidester proposes to submit with his proposals, in full satisfaction of the require-

Board of Health, District of Columbia.

ment contained in the 4th section of the act of 3d March, 1871, entitled 'An act making appropriations for the service of the Post-Office Department for the year ending June 30, 1872, and for other purposes,' (16 Stat., 572.)"

Upon this case I am of opinion that the check or draft of Mr. Chidester, not exceeding \$10,000, drawn upon the said bank and deposited with the Postmaster-General, together with the letter of the bank, is a sufficient compliance, to the extent of that sum, with the requirement of section 4 of the act of March 3, 1871. In contemplation of law and commercial usage, the security thus placed in the hands of the Postmaster-General would be precisely the same as if the certification were indorsed on the check itself.

Very respectfully, your obedient servant,

B. H. BRISTOW,

Solicitor-General, and Acting Attorney-General.

Hon. J. W. MARSHALL,

Acting Postmaster-General.

NOTE.—See note to opinion dated July 24, 1871, ante, p. 478.

BOARD OF HEALTH, DISTRICT OF COLUMBIA.

The Attorney-General is not authorized to give an official opinion upon a question concerning the Board of Health of the District of Columbia, such question not arising in the administration of any of the Executive Departments.

DEPARTMENT OF JUSTICE,

November 21, 1871.

SIR : I have the honor to acknowledge the receipt of your letter of the 10th instant, inclosing one to you from the chairman of the committee on ordinances of the Board of Health of the District of Columbia, requesting my opinion as to "whether the law creating that board provides an attorney, and who is said attorney."

Though ready to accommodate that board, and to aid the members in their duties in any proper way, I yet feel unauthorized to give an official opinion upon the questions presented. The 6th section of the act to establish the Depart-

Land-Grant Roads.

ment of Justice, (16 Stat., 163,) which in this particular seems to be affirmative of the former practice of this office, limits the functions of the Attorney-General in giving opinions upon questions of law at the request of heads of Departments to such questions as arise "in the administration of their respective Departments." The present question not being of that character, I think it inexpedient that I should render the opinion requested.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. GEORGE S. BOUTWELL,

Secretary of the Treasury.

LAND-GRANT ROADS.

By the 7th section of the act of September 20, 1850, granting public lands in aid of the construction of a railroad from Chicago to Mobile, such railroad became a public highway for the purposes mentioned in said section for its whole length, and not merely for that part of the road along which the granted lands were located.

DEPARTMENT OF JUSTICE,

November 21, 1871.

SIR : Your letter of the 5th ultimo presents this question : To what extent a railroad, to aid in the construction of which Congress has donated portions of the public domain, can be considered a public highway for the free use of the Government of the United States in the transportation of its troops and property ; whether the whole road should be so considered, or only that portion along which the company have actually selected lands.

The question now arises under the act of September 20, 1850, granting land in aid of the construction of a railroad from Chicago to Mobile, which in the 7th section provides that "the said railroad and branches shall be and remain a public highway for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States," (9 Stat., 467.)

I am of opinion that a road which receives any aid under

Foreign Diplomatic Commission.

such a grant becomes a public highway, for the purposes aforesaid, for its whole length. There is nothing in the language of the act to confine the character of a public highway to that portion of the road along which the granted lands may happen to lie. The law does not require that the proceeds of the lands shall be particularly applied to the construction of the adjacent parts of the road. But they go into the general funds of the road, and are applied indiscriminately to the whole work. The road is a unit, and any aid to it, by grant, subjects the whole of it to the condition which accompanies the grant.

Under any other rule, it might happen that a road would be broken up into short and irregular divisions, alternately open and closed to the free use of the Government, and nothing could be more useless than a right to transportation subject to such interruptions.

Where there is no essential variation in the terms of the grant from the provision above quoted, the rule which I have here given is applicable. And this answers, with as much explicitness as is possible in so general a statement, your request for a rule which shall enable your Department properly to fix the termini of the land-grant roads or land-grant portions of roads subject to the conditions of free use for transportation.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. WILLIAM W. BELKNAP,
Secretary of War.

FOREIGN DIPLOMATIC COMMISSION.

A minister plenipotentiary from the United States to a foreign power cannot, without the consent of Congress, accept a similar commission from a third power; though he is not prohibited from rendering a friendly service to a foreign government, even that of negotiating a treaty, provided he does not become an officer thereof.

DEPARTMENT OF JUSTICE,

November 23, 1871.

SIR: I find no authority pertinent to the question which

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you informally submitted to me on the 17th instant, to wit, whether an American minister to one foreign power can accept a diplomatic commission to the same power from another foreign power, except the opinion of Attorney-General Cushing that the marshal of the United States for the southern district of Florida is prohibited from holding the office of commercial agent of France, without the consent of Congress, by the last clause of section nine, article one, of the Constitution, (6 Opins., 409.)

A minister plenipotentiary from this Government to a foreign power certainly holds an office of profit and trust under the United States. A similar commission from a third power gives him an office under such power, and this the Constitution forbids him to accept.

Unquestionably, a minister of the United States abroad is not prohibited by the Constitution from rendering a friendly service to a foreign power, even that of negotiating a treaty for it, provided he does not become an officer of that power. But whatever difficulties may grow out of the vagueness with which this term is defined in the books, it is clear that the acceptance of a formal commission as minister plenipotentiary creates an official relation between the individual thus commissioned and the government which in this way accredits him as its representative.

Valid treaties have been negotiated by uncommissioned persons, for it is the ratification and not the original authority of the negotiator which gives validity to a treaty. But the character of a minister plenipotentiary is known to the law of nations and to the Constitution of the United States (Art. I, section 2) as an office, and no person without the consent of Congress can properly accept it while holding an office of profit or trust under the United States.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. HAMILTON FISH,

Secretary of State.

Court of Claims.

COURT OF CLAIMS.

Under the proviso to the 11th section of the act of February 24, 1855, the head of a Department is not at liberty to furnish to the Court of Claims, on a call from that court, information or papers, when to do so would, in his opinion, be injurious to the public interest.

DEPARTMENT OF JUSTICE,*November 24, 1871.*

SIR: On the 3d of July last you requested my opinion in relation to the duty of your Department to furnish papers upon the call of the Court of Claims. Two rules of that court were inclosed requesting you to furnish duly authenticated copies of certain papers supposed to be on file in your Department, for use as evidence on the trial of certain causes in that court.

The law upon this subject is contained in the act of February 24, 1855, to establish a court for the investigation of claims against the United States, (10 Stat., 612,) which in the 11th section authorizes the court to "call upon any of the Departments for any information or papers it may deem necessary * * *: *Provided*, That the head of no Department shall answer any call for information or papers, if, in his opinion, it would be injurious to the public interest."

Under this provision it is clear that you are not at liberty to furnish to the court information or papers when to do so would, in your opinion, be injurious to the public interest, and a return setting forth such opinion would in all cases be a sufficient answer to the rule.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. Wm. W. BELKNAP,

Secretary of War.

Compromise of Post-Office Case.

COMPROMISE OF POST-OFFICE CASE.

The Auditor of the Treasury for the Post-Office Department, with the written consent of the Postmaster-General, has the power, under the 3d section of the act of March 3, 1851, to compromise, release, and discharge a claim for a penalty for the violation of the postal laws.

DEPARTMENT OF JUSTICE,
November 25, 1871.

SIR: In answer to your letter of the 22d instant, on the subject of a proposed compromise with Charles E. Bacon, surety to the United States for Calvin F. S. Thomas, on a bond for a penalty for the violation of a post-office law, I have the honor to say that, in my judgment, the Auditor of the Treasury for the Post-Office Department, with your written consent, has the power, under the 3d section of the act of March 3, 1851, (9 Stat., 593,) to compromise, release, and discharge the claim against Bacon.

Upon your other question, whether there is any room for doubt as to the validity of the judgment rendered against Bacon in the circuit court, which is now before the Supreme Court on writ of error, I think the probabilities are that the judgment of the circuit court will be affirmed in the Supreme Court. But the questions involved in the case being new, and, so far as I am advised, undetermined in the courts of the United States, and there being force in some of the arguments which have been presented in opposition to the judgment, I do not feel at liberty to use a stronger term than *probability* in expressing my anticipations of the result of the case in the Supreme Court.

Very respectfully, your obedient servant,
A. T. AKERMAN.

Hon. J. A. J. CRESWELL,
Postmaster-General.

NOTE.—Section 3 of the act of March 3, 1851, mentioned in the foregoing opinion, is repealed by the act of June 8, 1872, (17 Stat., 283,) and its provisions supplied by sections 315 and 316 of the latter act.

Militia of the District of Columbia.

NEUTRALITY LAW.

Proof that a vessel transported from Aspinwall to the coast of Cuba men, arms, and munitions of war, destined to aid the Cuban insurgents, is insufficient, by itself, to warrant proceedings against such vessel for violation of the neutrality law of the United States.

DEPARTMENT OF JUSTICE,

December 4, 1871.

SIR: I have the honor to acknowledge the receipt of your letter of the 28th of November last, inclosing a communication of the 14th of that month, to yourself, from the Spanish minister, in relation to the expedition of the Hornet to the coast of Cuba; and, in pursuance of your request, I have carefully read and considered the communication of the Spanish minister, with the accompaniments thereof.

Assuming the credibility of the sworn statements which he has transmitted, I do not think that they prove against the Hornet any violation of the neutrality laws of the United States. They show that the Hornet conveyed from Aspinwall to the coast of Cuba men, arms, and munitions of war, destined to aid the Cuban insurgents.

This proof, by itself, does not bring the vessel within the 3d section of the neutrality act of April 28, 1818, (3 Stat., 448.)

It might be material in connection with other proof, but, unsupported, I think it insufficient to warrant proceedings against the Hornet.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. HAMILTON FISH,

Secretary of State.

MILITIA OF THE DISTRICT OF COLUMBIA.

The act of Congress of February 21, 1871, providing a government for the District of Columbia, does not repeal or modify the act of March 3, 1803, providing for the organization of the militia of the District; nor does it confer upon the legislative assembly of the District power to repeal or modify the provisions of the latter act.

Militia of the District of Columbia.

Congress not having placed the Secretary of War under the direction of the said legislative assembly, it has exceeded its powers in enacting that "the officers of the District militia shall be commissioned by the Secretary of War."

Under the act of February 21, 1871, it is the duty of the governor of the District to commission all officers created by the District legislative assembly.

DEPARTMENT OF JUSTICE,

December 25, 1871.

SIR: Your letter of the 26th of October last calls my attention to an act of the legislative assembly of the District of Columbia, entitled "An act to provide for the organization and discipline of the militia of the District of Columbia," approved by the governor of the District August 19, 1871, in the 22d section of which it is provided that "all commissioned officers of the militia shall be commissioned by the Secretary of War, on the recommendation of the governor;" and you inquire whether the act of Congress of February 21, 1871, "to provide a government in and for the District of Columbia," repeals or qualifies the act of March 3, 1803, "more effectually to provide for the organization of the militia of the District of Columbia," (2 Stat., 215.)

The immediate occasion for the call for this opinion is the application which has been made to you to commission certain persons as officers of the militia of the District under the aforesaid act of the legislative assembly.

The act of Congress of February 21, 1871, nowhere in terms gives the legislative assembly any power over the militia of the District. If such power is conferred at all by that act, it must be conferred in the 18th section, which enacts that the legislative power of the District shall extend to all lawful subjects of legislation within said District consistent with the Constitution of the United States and the provisions of this act, &c. These words are to be construed with reference to the objects of the act. These objects are declared in the 1st section, which constitutes the District "a body corporate for municipal purposes," and gives it power "to contract and be contracted with, sue and be sued, plead and be impleaded, have a seal and exercise all other powers of a municipal corporation, not inconsistent with the Constitution and laws of the United States and the provisions of this act." Other pro-

Militia of the District of Columbia.

visions also manifest a purpose in Congress to create a government essentially municipal, though the general form of the organization is territorial. In this country the control of the local militia has not been ordinarily, if ever, given to municipal governments, and where the municipal embraces the seat of the National Government there are strong reasons why the immediate control of its militia should be reserved to the national authority. At least it is not probable that Congress would part with that control without declaring the purpose to do so in express terms. Language similar to that above quoted in the 18th section is found in most of the acts for the organization of territorial governments, and has been supposed to give to those governments power over the territorial militia; but those acts, either by their general objects or by some distinct expression, show that the control of the militia was within the contemplation of Congress. In most if not all of them the territorial governor is declared to be the commander-in chief of the militia, an office not conferred by Congress upon the governor of the District of Columbia.

It is my opinion, therefore, that the act of February 21, 1871, does not repeal or qualify the act of March 3, 1803, and does not give to the legislative assembly of the District the power to repeal or qualify said act, and that said act is still in force.

Whether this conclusion is right or wrong, there can be no doubt that the legislative assembly has exceeded its powers in enacting in the 22d section of its act of August 19, 1871, that "the officers of the District militia shall be commissioned by the Secretary of War." Congress has not placed the Secretary of War under the direction of the legislative assembly. Moreover where officers are created by law enacted by the District assembly, it is made the duty of the governor of the District, not of the Secretary of War, to commission the officers, by this very plain provision of the 2d section of the act of February 21, 1871: "He (the governor) shall commission all officers who shall be elected or appointed to office under the laws of the said District, enacted as aforesaid,"

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. WM. W. BELKNAP,

Secretary of War.

Promotion on Retired List of the Navy.

PROMOTION ON RETIRED LIST OF THE NAVY.

The *proviso* to section 9 of the amendatory act of March 2, 1867, "that no promotion shall be made to the grade of rear-admiral upon the retired list while there shall be in that grade the full number allowed by law," does not forbid the advancement to that grade on the retired list, under section 1 of the act of July 25, 1866, of any commodore who may have commanded a squadron by order of the Secretary of the Navy, or performed other highly meritorious service.

DEPARTMENT OF JUSTICE,

December 27, 1871.

SIR: Your letter of the 11th instant calls for my opinion on the question whether or not the law authorizes or requires the promotion of Commodore John H. Aulick to the grade of rear-admiral on the retired list.

I understand that Commodore Aulick is now a commodore upon the retired list, and that he has commanded a squadron by order of the Secretary of the Navy, and has performed other highly meritorious services.

The act of July 16, 1862, to establish and equalize the grade of line officers of the United States Navy, provides, in section 14, that there may be allowed upon the retired list nine rear-admirals and eighteen commodores. The rear-admirals shall be selected by the President, by and with the advice and consent of the Senate, from those captains who have given the most faithful service to their country. The eighteen commodores shall be recommended from the list of captains by an advisory board of admirals. After the above numbers are commissioned, promotions to those grades upon the retired list shall be by seniority, subject to an advisory board, (12 Stat., 585.)

The act of July 25, 1866, "to define the number and regulate the appointment of officers in the Navy, and for other purposes," in section 1, after certain provisions concerning the number of line officers in each grade on the active list of the Navy, contains the proviso "That nothing in this act, nor in the 14th section of the act approved July 16, 1862, entitled, 'An act to establish and equalize the grade of the line officers

Promotion on Retired List of the Navy.

of the Navy,' shall be so construed as to prevent the Secretary of the Navy from promoting to the grade of rear-admiral on the retired list those commodores who have commanded squadrons by order of the Secretary of the Navy, or who have performed other highly meritorious service," (14 Stat., 222.)

This proviso has been construed in practice (and I think correctly) to permit an increase of the number of rear-admirals on the retired list above the nine authorized by the act of 1862. The number authorized by the act of 1862, which is to be recruited as vacancies occur by seniority, subject to an advisory board as therein directed, still remains nine. The number authorized by the act of 1866 is indefinite, being determinable by the number of commodores who have performed the meritorious services mentioned in the act, and the disposition of the appointing power to promote such commodores to the grade in question.

Section 9 of the act of March 2, 1867, to amend certain acts in relation to the Navy, is as follows: "That officers on the retired and reserved lists of the Navy shall be entitled to promotion as their several dates upon the active list are promoted; but such promotion shall not entitle them to any pay beyond that to which they were entitled when retired, unless upon active duty, when they shall receive the full pay of their respective grades: *Provided*, That no promotion shall be made to the grade of rear-admiral upon the retired list while there shall be in that grade the full number allowed by law."

This proviso has been supposed to present an obstacle to the promotion of Commodore Aulick, because there are more than nine rear-admirals upon the retired list. But I do not think that in fair construction it is such an obstacle.

At the date of the act of March, 1867, there was no definite limitation of the whole number of rear-admirals upon the retired list. There was a limitation upon the number appointed in pursuance of the act of 1862, but no such limitation upon the number appointed in pursuance of the act of 1866. Therefore, "the full number allowed by law," an expression in the proviso manifestly intended to include all who might then lawfully be put in the grade of rear-admirals on the re-

Case of Edward Dwight, a Choctaw Indian.

tired list, must be the indefinite number made up of the nine appointed under the act of 1862 and of those appointed under the act of 1866, or the proviso is altogether without meaning. In neither case does it forbid the promotion of Commodore Aulick.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. GEORGE M. ROBESON,

Secretary of the Navy.

CASE OF EDWARD DWIGHT, A CHOCTAW INDIAN.

Property belonging to an Indian may be seized in the Indian Territory for a violation of the internal-revenue laws.

DEPARTMENT OF JUSTICE,

December 28, 1871.

SIR: On the 7th of March, 1870, you referred to Mr. Hoar, then Attorney-General, for an opinion upon the legal questions involved, a communication to yourself from Mr. Cox, then Secretary of the Interior, on the subject of the complaint of Edward Dwight, a Choctaw Indian, who requested that steps should be taken by the office of Indian Affairs to restore his property seized by the United States marshal for an alleged violation of the internal-revenue laws, and to indemnify him for damages sustained by such seizure.

I have no doubt that the reason why the required opinion was not given by Judge Hoar was that the question was then before the Supreme Court of the United States in the cause known as *The Cherokee Tobacco*. That cause has since been argued, and the decision of the Supreme Court is in 11 Wallace's Reports, p. 616. The court decides in that case that the 107th section of the internal-revenue act of July 20, 1868, (15 Stat., 167,) extends the internal-revenue laws, imposing taxes on distilled spirits, fermented liquors, tobacco, snuff, and cigars, over the Indian Territory, and the principle of this decision covers the case of Mr. Dwight, and shows that he is not entitled to the relief which he asks from the office of Indian Affairs.

Very respectfully, your obedient servant,

A. T. AKERMAN.

The PRESIDENT.

New Granadian Passenger-Tax.

NEW GRANADIAN PASSENGER-TAX.

The passenger-tax of two dollars per head levied in the year 1849 and subsequent years by the State of Panama, a province of the republic of New Granada, under authority from that republic, upon the captains of all vessels embarking or disembarking passengers in that State, was in substance and effect, so far as it affected citizens of the United States passing across the Isthmus of Panama, a violation of the 35th article of the treaty between the United States and New Granada of December 12, 1846, which provided that the right of way or transit across the said isthmus "should be open and free to the Government and citizens of the United States," &c.

The rule that, before a citizen of one country is entitled to the aid of his government in obtaining redress for wrongs done him by another government, he must have sought redress in vain through the judicial tribunals of that other government, is inapplicable where (as in the present case) the offending government, by the acts of its proper organ, relieves the injured party from the obligation of pursuing such a course.

DEPARTMENT OF JUSTICE,

December 28, 1871.

SIR: On the 14th of November, 1866, Mr. Seward, then Secretary of State, addressed to Mr. Stanbery, then Attorney-General, a request for an opinion upon certain questions relating to the claim of the Pacific Steamship Company for indemnity from the government of New Granada for a passenger-tax of two dollars per head, collected by the State of Panama from said company in the year 1850, and several years thereafter, for American passengers conveyed by the company across the Isthmus of Panama, on their way between the eastern parts of the United States and California.

For some reason unknown to me this request has not hitherto received a response, and having learned that you desire one, I have examined the papers and proceed to state my opinion upon the questions presented by Mr. Seward.

The claim was before the commission under the convention with New Granada of September 10, 1857, extended by the convention of February 10, 1864. The commissioners of the two governments disagreeing upon the claim, it was referred to the umpire, Sir Frederick Bruce, who decided against it

New Granadian Passenger-Tax.

upon grounds not affecting the merits, with the reservation that the award should "not prejudice the rights of the claimants, should the Government of the United States decide at any time hereafter that, under the treaty of 1846, the imposition of the passenger-tax constituted such a violation of its letter or spirit as to authorize a demand for redress."

The foundation of the claim was that this passenger-tax was in contravention of the treaty between the United States and New Granada, of December 12, 1846, (9 Stat., 881.) That treaty provides, in article 35, that the right of way or transit across the Isthmus of Panama "should be open and free to the Government and citizens of the United States; * * * * nor shall the citizens of the United States be liable to any duties, tolls, or charges of any kind to which native citizens are not subjected, for thus passing the said isthmus." And in the same article the United States guaranteed the perfect neutrality of said isthmus, and "the rights of sovereignty and property which New Granada has and possesses over the said territory." Panama, one of the States comprising the republic of New Granada, levied a passenger-tax of two dollars a head upon the captains of all vessels embarking or disembarking passengers in Panama. This tax was paid by the company, and now the company, composed of citizens of the United States, affirming that this tax was in violation of said treaty, calls upon the Government of the United States to obtain indemnity from the offending government.

On the 9th of January, 1850, Mr. Clayton, Secretary of State, having information that this tax had just been imposed, directed Mr. Foote, chargé of the United States at Bogota, to remonstrate against it, and declared "that this Government considers it at least contrary to the spirit of the treaty of 12th December, 1846." Mr. Foote, on the 1st day of April, 1850, addressed to Mr. Paredes, the secretary of state for foreign affairs of New Granada, a remonstrance against this tax as a violation of said treaty, and requested "the exercise of the constitutional power of the general government of New Granada to abrogate or disallow the act of the provincial assembly of Panama," which imposed said tax.

On the 20th of April Mr. Paredes replied to Mr. Foote, and

New Granadian Passenger-Tax.

declined to comply with the request in Mr. Foote's letter, "because, according to the institutions of the republic, the decrees of the provincial assemblies cannot be invalidated or revoked by any other authority, except they be evidently beyond their attributes, or expressly contrary to the constitution or the laws, a case which does not comprehend the decree in question, which was issued by the provincial assembly of Panama, by virtue of an express legal authorization."

Then he proceeds to state that a law of the republic, that of the 2d of June, 1849, authorized the State of Panama to impose the tax in question, and then insists that the decree is not contrary to the treaty. Then, as if intending in a very solemn manner to assume for his government whatever of international responsibility might grow out of said tax, he restates his position in the following language :

"The undersigned, therefore, finds himself obliged to repeat, in the name of his government, that the decree of the provincial assembly of Panama, against which Mr. Foote has conceived he ought to remonstrate, is not opposed in any way to equity, nor to the stipulations of the treaty of 1846."

The construction put upon the treaty by Mr. Clayton was maintained by Mr. Marcy, Secretary of State, in a dispatch to Mr. Greene, chargé at Bogota, dated February 16, 1854; by Mr. Marcy again in a dispatch to Mr. Bowlin, dated July 3, 1855; again by Mr. Hunter, Acting Secretary of State, in a dispatch to Mr. Bowlin, dated July 31, 1855; in a communication of Mr. Bowlin to the secretary of state for foreign affairs of New Granada, dated September 19, 1856; and in a communication by Mr. Cass, Secretary of State, to General Herran, minister of New Granada at Washington, dated September 10, 1857.

Some persons acquainted with the international polity of New Granada were of opinion that the State or province of Panama in imposing this tax violated the constitution or fundamental law of the republic, by assuming legislative power which belonged only to the national legislature. And a ground of objection which has been made to the present claim is that the company did not challenge this tax as unconstitutional in the courts of New Granada, and carry the question to the highest judicial tribunal of the country.

New Granadian Passenger-Tax.

Upon these facts the first question which I am called to answer is as to the alleged obligation to contest the constitutionality of the tax before the judicial tribunals of New Granada of the last resort.

It has often been laid down that, before a citizen of one country is entitled to the aid of his government in obtaining redress for wrongs done him by another government, he must have sought redress in vain from the tribunals of the offending power. The object of this rule plainly is to give the offending government an opportunity of doing justice to the injured party in its own regular way, and of thus avoiding all occasion for international discussion. In the present case, the interposition of the Government is not asked on account of alleged violation of the constitution of New Granada by the legislature of Panama, but on account of an alleged violation of a treaty between the United States and New Granada by a public authority of the latter country.

Here was a protest as soon as the exaction began, both by the agents of the company and by the counsel of the United States. The agents of the company were powerless to resist it, and they paid it under compulsion. Their government immediately makes complaint to the New Granadian minister of foreign affairs, and he in the name of his government pronounces the exaction to be authorized by the domestic law of the country, and not to be in contravention of the treaty. He does not remit the complaining parties to the judicial tribunals, but undertakes himself to express the sense of his government in the matter. He is the organ through whom his government addresses itself to foreign powers. To foreign powers that government is a unit, at least when it does not choose to express itself through more than one officer of its component parts, and the person whom foreign powers and citizens must accredit as its spokesman says that no redress will be accorded, for no wrong has been done. Why go further and interrogate another branch of the government? Must it not be presumed that, when the executive speaks for his country to a foreign power, he knows how the judiciary of his country would determine the questions of law involved in the matter?

When Mr. Paredes told Mr. Foote that the tax imposed by

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Panama was authorized by the national legislature, and was not in violation of the treaty, I think that he relieved the Government and the interested citizens of the United States from all obligation to go to the courts of New Granada, on the question of constitutionality or any other question.

Whether the Government of the United States, in 1850 and afterward, might have declined to make this tax a subject of diplomatic complaint to New Granada until the citizens affected thereby had sought redress in vain from the highest judicial tribunals of the latter country, is a question entirely between the Government of the United States and its injured citizens. Those charged with its foreign relations thought proper to remonstrate to the government of New Granada, and their remonstrances were met, not by the preliminary objection that the appeal had been made to the wrong part of the government, but by the radical objection that there was no ground for the complaint, and in the answer it was maintained that the tax was not contrary to the constitution or the laws of that country, but was imposed by virtue of an express legal authorization.

The government of New Granada then disdained to shelter itself under the rule above referred to. I think the rule is not applicable to the case, and that the company was not bound to test the constitutionality of the tax before her judicial tribunals.

Other views, such as the probable unproductiveness of an appeal to the courts, the difficulties in the way of reaching the public treasury by any legal process, &c., lead to the same conclusion, but it is unnecessary to present them fully.

The second question is this: Was the tax legal under the treaty?

For over twenty years the legality of the tax under the treaty has been denied by the Executive of the United States. But apart from this weighty authority, I think that a fair consideration of the language of the treaty and of the circumstances under which this tax was imposed would lead to the conclusion that the tax is inconsistent with the treaty. Literally, the tax did not violate the treaty, for it was imposed indiscriminately upon all passengers; and the treaty merely stipulates that citizens of the United States shall not be lia-

New Granadian Passenger-Tax.

ble for charges for passing the isthmus, to which native citizens are not subjected. But the plain intent of the treaty is defeated by the tax.

In the interpretation of treaties, such rules as the following are elementary: "The interpretation which would render a treaty null and inefficient cannot be admitted." (Vattel, book 2, chap. 17.) "Good faith adheres to the intention, fraud insists on the terms when it thinks it can furnish a cloak for its prevarication." (*Ibid.*) "If a case occurs to which the well-known reason of a law or promise is utterly inapplicable, that case ought to be excepted, although, if we were to barely consider the meaning of the terms, it would seem to fall within the purview of that law or promise." (*Ibid.*) "The party who endeavors to avoid a loss has a better cause to support than he who aims at obtaining an advantage." (*Ibid.*) "International treaties are covenants *bona fide*, and are therefore to be equitably, and not technically, construed." (2 Phillimore, 79.)

One of the consequences of the discovery of gold in California, in 1848, was to make the Isthmus of Panama a great highway between different parts of the United States. When thousands of citizens of the United States were crossing the isthmus, the State of Panama conceived that it could make these travelers fill its treasury, and accordingly levied this tax. If the tax had been imposed with no purpose of a special exaction from citizens of the United States, the case might have been different. But it is impossible, in the light of the fact that the transit of citizens of the United States was the rule and the transit of New Canadians the exception, to avoid the conclusion that the tax was imposed because it would fall principally upon citizens of the United States; and this is in substantial violation of the treaty.

The treaty secures to citizens of the United States free transit across the isthmus. If every traveler could be required to pay any toll that the State of Panama might choose to impose, this provision of the treaty could be practically nullified.

I am of the opinion that the treaty, fairly construed, under the rules of good faith which friendly nations are presumed to

Responsibility for Corruption of Public Officer.

observe in dealing with each other, prohibits the imposition of the tax in question.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. HAMILTON FISH,
Secretary of State.

RESPONSIBILITY FOR CORRUPTION OF PUBLIC OFFICER.

The government of Brazil is not responsible for damage resulting to a citizen of the United States from the alleged corruption of a municipal judge, in that country, in authenticating and ratifying the report of a board of surveyors upon a damaged vessel, though the charge were established.

DEPARTMENT OF JUSTICE,

December 29, 1871.

SIR: On the 17th of January, 1868, the Secretary of State called on the Attorney-General for an opinion upon the question whether the government of Brazil is justly responsible for damages resulting from the alleged corruption of its municipal judge at St. Catharines, in authenticating and ratifying the report of a board of surveyors upon a damaged vessel.

The claim for damages is preferred by Mr. Wells, the agent at St. Catharines of certain insurance companies in New York and Philadelphia that were injured by the proceedings in which the alleged misconduct occurred.

Even if the charge of corruption were established, which does not appear to be the fact, I am of opinion that the Brazilian government would not be responsible. The misconduct violated no treaty stipulations between Brazil and the United States. It did not benefit the public treasury of that country, but was in aid of a private interest. For aught that appears, a civil proceeding in the courts of Brazil would produce adequate redress.

For a thorough discussion of the subject of the liability of governments for the faults of their officers, I refer you to the opinion of Attorney-General Cushing of May 25, 1855, (7 Opins., 229.) In a case similar in principle to the present, he considered that the Government of the United States was

Case of the Steamer "Tipitapa."

not responsible to an injured foreigner. In all fairness we must adhere to the same rule when our own citizens are injured by the officers of a foreign country.

Very respectfully,

A. T. AKERMAN.

Hon. HAMILTON FISH,
Secretary of State.

CASE OF THE STEAMER "TIPITAPA."

Where an officer with a party of armed men, acting under an order of a judicial officer of the port of Granada, seized an American vessel at that port, kept possession of it a few hours, and then withdrew pursuant to an order of the same judge, the seizure having been made for the purpose of enforcing a supposed legal right: Advised that this Government ought not to make reclamation in behalf of the owner, as it is presumable that, if the proceedings were illegal, the judicial tribunals of Nicaragua will afford redress.

DEPARTMENT OF JUSTICE,
January 1, 1872.

SIR: A letter from the Secretary of State to the Attorney-General, dated April 25, 1868, requests an opinion upon the legal questions applicable to the case of the Central American Transit Company's steamer Tipitapa.

The facts appear to be that on the 4th of February, 1868, while said steamer was lying at anchor in the port of Granada, and the crew were engaged in discharging freight, a captain of marines, with a party of armed men, under an order of a judge of commerce of the port, took forcible possession of the steamer, kept it about three hours, when they withdrew in pursuance of an order of the same judge. No actual violence appears to have occurred, except a slight assault upon one of the seamen.

The seizure seems to have been made at the instance of the consignees of the vessel, as a mode of enforcing a supposed legal right.

If these proceedings were legal, they afford no ground of complaint. If they were illegal, it is presumable that the judicial tribunals of Nicaragua will afford redress. No good

Mobile Marine Dock.

reason is shown for not making an application to those tribunals.

I am therefore of the opinion that this Government ought not to make reclamation in behalf of the company.

Very respectfully,

A. T. AKERMAN.

Hon. HAMILTON FISH,

Secretary of State.

MOBILE MARINE DOCK.

In April, 1865, the marine dock at Mobile, Alabama, with a quantity of lumber and other materials, the whole belonging to the Mobile Marine Dock Company, was seized by the military authorities and used in the Government service until in November, 1865, the materials having been consumed in the mean time, when the dock was turned over to the officers of the company. Claim being made by the latter for the use of the dock and for the value of the materials, &c.: *Held* that the claim originated during the war for the suppression of the rebellion, and that its settlement is prohibited by the act of February 21, 1867.

DEPARTMENT OF JUSTICE,

January 2, 1872.

SIR: The claim of the Mobile Marine Dock Company, concerning which the opinion of the Attorney-General was requested by the Secretary of War in a communication dated April 3, 1869, rests on the following facts:

In April, 1865, when Mobile fell into the hands of the United States forces, the marine dock at that place, with a quantity of lumber and other materials, was seized by the military authorities. From that time until the 15th of November following, the dock was in charge of the Quartermaster's Department, and was used in the repair of vessels in the service of the United States. A few vessels not in the service of the Government were also repaired during that time, and for this work the Government received pay from their owners. These repairs were conducted under the supervision of the superintendent of the company, who, with all the mechanics and others employed under him at the time of the capture, was transferred to the service of the Government in the dock, and received pay and rations from the Government. Novem-

Mobile Marine Dock.

ber 15, 1865, the dock was turned over to the officers of the company. The lumber and other materials taken when the dock was seized in April had been consumed by the Government.

It is charged that the dock was used during the war by the rebels for the repair of vessels of war and blockade-runners, and was commanded by Admiral Buchanan, of the rebel navy, just before the surrender.

On the last point there is some conflict of testimony.

The company claims compensation for the docking and repairing of vessels, for the lumber and materials taken, and for the cost of repairing the dock after the use of it by the Government.

Upon this claim the question has arisen whether the settlement of it is not prohibited by the act of February 21, 1867, "to declare the sense of an act," &c. The pertinent part of the act is as follows: "That the provisions of chapter 240 of the acts of Thirty-eighth Congress, 1st session, approved July 4, 1864, shall not be construed to authorize the settlement of any claim for supplies or stores taken or furnished for the use of or used by the armies of the United States, nor for the occupation of or injury to real estate, nor for the consumption, appropriation, or destruction of or damages to personal property by the military authorities or troops of the United States, where such claim originated during the war for the suppression of the southern rebellion in a State or part of a State declared in insurrection by the proclamation of the President of the United States, dated July 1, 1862, or in a State which by an ordinance of secession attempted to withdraw from the United States Government," (14 Stats., 379.)

The company states its claim in language somewhat different from that used in the act, but in substance the claim is for the occupation of real estate, (the dock,) for injury to real estate, (the dock,) and for the consumption and appropriation of personal property, (the lumber, and other materials,) by the military authorities of the United States in a State (Alabama) declared in insurrection by the President's proclamation. Nothing more is required to bring it within the act but to show that it originated during the war for the suppression of

Seamen's Wa es.

the rebellion. It is judicially settled that for some purposes, at least, the rebellion was not closed until the President's proclamation of August 20, 1866, (14 Stat., 814,) *United States vs. Anderson*, 9 Wallace, 56.

If the date of the proclamation of April 2, 1866, (14 Stat., 811,) should be taken as the end of the war in Alabama, the present case is still left within the prohibition of the act. The military necessity for the occupation and use of private property did not cease at the instant when the principal armies of the rebellion were overcome, and it seems that if Congress in 1867 had considered the war to have ended before the President's proclamation, it would have indicated the time in the act.

I am of the opinion that the present claim originated during the war, and cannot be settled by the War Department. (See 12 Opins., 362, 486.)

As these views dispose of the claim, it is unnecessary to consider the question propounded by the Secretary.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. Wm. W. BELKNAP,

Secretary of War.

SEAMEN'S WAGES.

Where the crew of an American ship had been shipped by the master in the United States, and the shipping articles contained a clause that "all moneys were to be paid in United States currency or its equivalent in gold at the current rate of exchange:" Held that, in settling some accounts with the master, at Singapore, India, for the wages of his crew, the United States consul there should have allowed a deduction from the pay of the seamen of the difference between "greenbacks" and gold or silver, the currency of Singapore, and the cost of exchange thereon between India and America.

Though the law is liberal in construing contracts in favor of seamen, still it holds them capable of contracting, and bound like other persons by their contracts when no fraud is practiced upon them.

DEPARTMENT OF JUSTICE,

January 4, 1872.

SIR: Your letter of October 5, 1870, requests my opinion upon the question presented in a communication to the State

Seamen's Wages.

Department from Mr. Jewell, consul of the United States at Singapore, India, dated June 13, 1870. The case is thus:

In settling some accounts with the master of the American ship *Fearless*, for seamen's wages, the master demanded that as the seamen had been shipped in the United States, where greenbacks were the currency, he be allowed to deduct from the pay of the seamen the difference between greenbacks and gold or silver, the currency of Singapore, and the cost of exchange thereon between India and America; and in support of this demand referred to a clause in the shipping articles which set forth that "all moneys were to be paid in United States currency or its equivalent in gold at the current rate of exchange." Mr. Jewell refused to allow the master to make this deduction, and desires to be informed if his action is correct, and adds, apparently as a reason for his decision, that "sailors seldom know what they are signing, further than that they are to receive so much per month."

The case seems to me a very plain one. The shipping articles are the contract for the service and compensation of the seamen. In this contract is a stipulation that the money should be paid in United States currency or its equivalent in gold at the current rate of exchange. This stipulation clearly justifies the demand of the master. Parties have certainly a right to agree in what currency payment for the services contracted for shall be made. Although the law is liberal in construing contracts in favor of seamen, still it holds those parties capable of contracting, and bound like all other persons by their contracts when no fraud is practiced upon them; and nothing of that sort is alleged here.

I am therefore of the opinion that the master should have been allowed to make the deduction which he claimed, and that the consul's action was incorrect.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. HAMILTON FISH,
Secretary of State.

Tax-Sales in Insurrectionary Districts.

TAX-SALES IN INSURRECTIONARY DISTRICTS.

It is competent to the officer of internal revenue designated by the Secretary of the Treasury, under the 3d section of the joint resolution of March 26, 1867, to perform the duties of tax-commissioner in South Carolina, to enter upon and sell lands that may have been previously sold partly for cash and partly on credit by the tax-commissioners in that State, pursuant to the provisions of section 11 of the act of June 7, 1862, in cases where default in the deferred payments has been made by the purchasers of such lands.

That officer can receive, at any time before entry and sale, the amount due on the deferred payments, including interest, and such payment will perfect the title of the purchaser so far as the Government is concerned.

The assignee of a certificate of sale issued by the tax-commissioners to a purchaser stands in the same situation as the latter, and upon payment by him of the amount in arrears, at any time prior to entry and sale by the aforesaid officer, becomes entitled to the property.

DEPARTMENT OF JUSTICE,

January 5, 1872.

SIR : On the 13th of September last I received a communication of that date from the then Acting Secretary of the Treasury, Mr. Hartley, inclosing a copy of a letter from the Commissioner of Internal Revenue of a previous date, with other papers, in regard to certain sales of real estate made by tax-commissioners in the State of South Carolina, under the provisions of the 11th section of the direct tax law of June 7, 1862, and the instructions of President Lincoln of September 16, 1863.

In that communication it is stated that the South Carolina tax-commissioners are not in office, and that the Secretary of the Treasury, acting under the authority conferred by the 3d section of the joint resolution of March 26, 1867, "for the importation into the United States of certain works of art duty free, and for other purposes," has designated an officer of internal revenue to perform the duties of the tax-commissioner. This statement is followed by a reference to the subject of the letter of the Commissioner of Internal Revenue, after which the following questions are proposed for my opinion :

Tax-Sales in Insurrectionary Districts.

"1. Can the officer appointed to perform the duties of the South Carolina tax-commissioner, under the above-cited joint resolution, receive *at any time* from a purchaser at the sale in obedience to the instructions of September 16, 1863, the sum due on the deferred payments stipulated for in the certificate?

"2. If so, will such payment perfect the title of the purchaser?

"3. Should the assignment of a certificate of sale by a purchaser to another person, such assignment being subsequent to the expiration of the time within which the deferred payment was to have been made, be recognized as giving the assignee a right to the property on payment of the sum due?

"4. Has the officer who has been appointed to discharge the duties of tax-commissioner a right to enter upon and sell the lands, in case of failure to make the deferred payments, as provided for in the certificate given at the time of sale?"

By the provisions of the 9th section of the act of June 7, 1862, for the collection of direct taxes in the insurrectionary districts, (12 Stat., 424,) the tax-commissioners were authorized to enter upon and take possession of lands struck off to the United States at tax-sales under the 7th section of the same act, and to lease the same for the term prescribed.

The 11th section authorized the commissioners, under the direction of the President, instead of leasing the lands as aforesaid, to cause them to be subdivided and sold at public sale; and it provided, among other things, that if upon such sale any person serving in the Army, or Navy, or Marine Corps should pay one-fourth part of the purchase-money, a certificate should be given, and he should have the term of three years in which to pay the remainder, either in money or in certificates of indebtedness from the United States.

It seems that under the instructions of the President, above mentioned, lands in South Carolina were sold at public sale by the tax-commissioners to persons serving in the Army, Navy, or Marine Corps, to whom, on payment of one-fourth of the purchase-money, certificates of sale were given, containing a condition to the effect that, in case the purchaser should fail to pay the residue of the purchase-money within the time limited for the payment thereof, to wit, the period of three

Tax Sales in Insurrectionary Districts.

years, it should be lawful for the commissioners, or their successors in office, to enter upon and sell the premises for the payment of the purchase money due the United States, interest, and costs ; the surplus proceeds, if any, to be returned to the purchaser, his heirs or assigns.

The questions propounded, as I understand them, relate to the sales thus made, and to the certificates of sale thus given.

It will be observed that the statute adverted to, which authorizes a sale upon payment of one-fourth of the purchase money, and allows a three-years' credit for the remainder, contains no provision looking to the security of the unpaid purchase money on the land, or otherwise, while it requires the commissioners to issue a certificate to the purchaser when he pays the one-fourth. So, where it authorizes a lease of the lands, there is no provision respecting the security of the rents. The absence of such provisions, however, is not to be understood as implying a want of power in the commissioners, under the direction of the President, to take any proper measure to secure the collection of the rents in the one case, or the payment of the unpaid purchase money in the other. This power is necessarily included in the authority to lease and to sell. The condition in the certificates to which reference has been made was designed to effect the object last mentioned, namely, to secure the payment of the unpaid purchase money. It operates as a lien upon the land, capable by its terms of being enforced by the commissioners or their successors in the event of default in such payment, and is in my judgment a proper measure for the purpose intended, and one which the commissioners had power to adopt.

I may state, then, in answer to the fourth question, that I entertain no doubt that it is legal for the officer who has been appointed, under the act of 1867, to discharge the duties of the tax commissioners, to enter upon and sell the lands where default has been made ; and in reply to the first and second questions, that in my opinion the officer can receive, at any time before entry and sale, the amount due on the deferred payments, including interest; and that such payment will perfect the title of the purchaser so far as the Government is concerned. In regard to the assignee of a certificate, he stands, in my opinion, in precisely the same situation as the

Soldiers' Bounty.

purchaser, and I accordingly answer the third question in the affirmative.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. GEO. S. BOUTWELL,
Secretary of the Treasury.

SOLDIERS' BOUNTY.

Where a person, in October, 1864, had enlisted for a term of three years under the act of July 4, 1864, and was discharged in July, 1867, agreeably to the provisions of a general order from the War Department authorizing discharges prior to the expiration of the term of enlistment in certain circumstances in which the soldier would be greatly incommoded by remaining the full term: *Held*, 1st. That if he was discharged with his own consent, his discharge not stating that it was granted by reason of the expiration of his term, he is not entitled to the last installment of bounty provided by the said act of July 4, 1864. 2d. If he was discharged without his consent, he is entitled to that installment. 3d. If his discharge states that he is discharged by reason of expiration of term of service, he is entitled to the installment by force of section 1 of the act of March 3, 1869.

DEPARTMENT OF JUSTICE,

January 6, 1872.

SIR: in your letter of September 23, 1870, you request my opinion concerning the claim of Private Franklin Miller, Company B, 13th Infantry, for the last installment of the bounty of three hundred dollars granted by section 1 of the act of July 4, 1864.

That section gives to every volunteer who is accepted and mustered into the service for a term of three years, unless sooner discharged, a bounty of three hundred dollars, one-third of which bounty shall be paid to the soldier at the time of his being mustered into the service, one-third at the expiration of one-half of his term of service, and one-third at the expiration of his term of service. (13 Stat., 379.)

Private Miller was enlisted for the term of three years under that act on the 15th of October, 1864, and was discharged July 27, 1867, under the provisions of General Order from

Soldiers' Bounty.

the War Department, No. 24, of 1859, the material part of which is as follows:

"At the remote interior stations, where the only means of communication with the settlements is by the occasional trains belonging to the Government, soldiers (who do not re-enlist) may be discharged one, two, or three months before their term is out, that they may avail themselves of such opportunities, whenever there is a reasonable certainty that they would otherwise be necessarily detained at the post for a period very much longer than that so docked from the service for which they are legally held."

Attorney-General Speed held, that when a volunteer under the act of July 4, 1864, was discharged before the expiration of one-half or the whole of his term of service, for the reason that his services are no longer required, he was not entitled to the installment of the bounty payable under that act at the end of the one-half or the whole term, as the case might be, (11 Opins., 223.)

Attorney-General Hoar, in an opinion dated January 18, 1870, held that actual service up to the time fixed by the act for the payment of each installment after the first was a condition-precedent to the soldier's receiving such installment.

The general order above quoted authorizes discharges prior to the expiration of the term in certain circumstances in which the soldier would be greatly incommoded by remaining for the full term.

A discharge under such circumstances is not less honorable than a discharge at the end of the term. But the fact nevertheless remains, that the soldier has not actually served for the time required, according to these opinions, to entitle him to the last installment of bounty.

These opinions of my predecessors seem to me fully warranted by the text of the act of 1864; but they are applicable only in cases where the discharge prior to the expiration of the term was with the consent of the soldier. If he preferred to remain and thus to secure the bounty, and was discharged without his fault and without his consent, his right to bounty is the same as if he had served to the end of his term. His readiness to serve stands in the place of actual service.

Soldiers' Bounty.

I am not informed whether private Miller's case falls within the act of March 3, 1869, which prescribes, in section 1, "that when a soldier's discharge states that he is discharged by reason of expiration of term of service," he shall be held to have completed the full term of his enlistment, and entitled to bounty accordingly, (15 Stat., 334.) Attorney-General Hoar, in an opinion dated January 19, 1870, considers this section applicable to soldiers enlisted under the act of July 4, 1864.

While it is remarkable that Congress should make the title to bounty determinable, not by the fact, but by what the discharge states, yet I see no escape from the obvious meaning of this peremptory statute.

It has been suggested that the War Department may withdraw the discharge issued, which purports, contrary to the fact, to discharge the soldier by reason of the expiration of his term of service, and to issue instead a discharge which shall correctly set forth the fact. But if this can be done, there was not the slightest occasion for the first section of the act of 1869. That section is meaningless, unless it makes the recitation in the discharge, whether true or false, conclusive. The former law made the title to the last installment of bounty dependent on the completion of the term. The act of 1869 entitles the soldier to that installment when the discharge purports to be granted "by reason of the expiration of the term." If this means that the soldier shall have the bounty only when this statement in the discharge is made, it does the superfluous office of enacting what was clearly the law. But Congress no doubt meant to give an arbitrary validity to the recitation in the discharge, and probably had in view a form of discharge that had been customary.

I am thus brought to these conclusions :

1. That if no material facts appear in the case, except that private Miller, having enlisted in October, 1864, for three years, was discharged in July, 1867, under the general order of 1859, with his own consent, his discharge not stating that it was granted by reason of the expiration of his term, he is not entitled to the last installment of bounty of one hundred dollars.

2. That if he was discharged without his consent, he is entitled to that installment.

Mail Transportation.

3. That if his discharge states that he is discharged by reason of expiration of term of service, he is entitled to that installment.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. Wm. W. BELKNAP,

Secretary of War.

MAIL TRANSPORTATION.

Section 14 of the act of March 3, 1845, gives the Postmaster-General exceptional authority to contract for steamboat service in certain cases, and under it he has the power to contract at once for that sort of service, without the advertisement and formalities prescribed in the case of general service.

DEPARTMENT OF JUSTICE,

January 6, 1872.

SIR: Your letter of this date states that at the letting of mail-contracts March 30 last, for service in the Southern States from July 1, 1871, to June 30, 1875, advertised September 3, 1870, the bidders on several steamboat routes failed to execute contracts or to begin service, and temporary contracts were made to keep the routes in operation until they could be again advertised. Under the re-advertisement for service from the 1st instant no bids were received for some routes, and in other instances the lowest bidders have failed to appear and begin the duty, rendering it necessary to provide for the service by other parties. Upon these facts you propound this question:

"Shall a re-advertisement take place in the manner and with the formalities prescribed in the several enactments of Congress relating to contracts for land service, or can the Postmaster-General, under section 14 of the act of March 3, 1845, (5 Stat., 737,) enter at once into contract with responsible parties for the remainder of the term, that is, to June 30, 1875, at a price not exceeding that previously paid, the public interest and convenience, in his opinion, being promoted thereby?"

I am of opinion that re-advertisement is not necessary, and that you can at once enter into the contracts described in your question.

Attachment of Funds due Government Contractors.

Section 14 is as follows: "*And be it further enacted*, That the Postmaster-General shall have power, and he is hereby authorized, to contract with the owners or commanders of any steamboat plying upon the western or other waters of the United States for the transportation of the mail for any length of time, or number of trips less than the time for which contracts for transporting the mail of the United States are now usually made under existing laws, and without the previous advertisements now required before entering into such contracts, whenever, in his opinion, the public interest and convenience will be promoted thereby: *Provided*, That the price to be paid for such service shall in no case be greater than the average rate paid for such service under the last preceding or then existing regular contract for transporting the mail upon the route he may so for a less time contract for the transportation of the mail upon."

My letter of July 22 last expresses the opinion which I still hold upon the questions therein discussed. But I considered them only with reference to the general mail-service. This section gives to the Postmaster-General exceptional authority to contract for steamboat service in certain cases, and under it you have the power to contract at once for that sort of service without the advertisement and formalities prescribed in the case of the general service.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. J. A. J. CRESWELL,

Postmaster-General.

NOTE.—The act of March 3, 1845, mentioned in the above opinion, is repealed by the act of June 8, 1872, (17 Stat., 283.)

ATTACHMENT OF FUNDS DUE GOVERNMENT CONTRACTORS.

An attachment issued by a State court against money due a contractor with the Post-Office Department, in the hands of a postmaster, should not prevent the latter from paying the contractor in accordance with the directions given by the Department.

It is settled that money in the hands of a disbursing agent of the Government is not subject to attachment at the suit of creditors of the parties to whom such money is due.

Attachment of Funds due Government Contractors.

DEPARTMENT OF JUSTICE,**January 7, 1872.**

SIR: From your letter of the 3d instant, and the accompanying papers, it appears that Mr. Samuel Strong had contracted with the Post-Office Department to furnish certain street letter-boxes for the several letter-carriers' offices. In pursuance of this contract he had furnished one hundred boxes for the city of New York, for which the postmaster at New York was instructed by the Post-Office Department to make payment to Mr. Strong. After the boxes had been furnished, but before the order of payment was issued by the Post-Office Department, an attachment at the instance of a creditor of Mr. Strong was issued by Judge Cardozo, one of the judges of the supreme court of New York, and served on the postmaster, directing him to withhold payment from Mr. Strong.

You inquire, first, whether this attachment will operate to prevent the postmaster at New York from paying Mr. Strong, as contracted by the Post-Office Department; and, second, whether I will instruct the district attorney at New York to defend the postmaster in any adverse legal proceeding, for conforming to the opinion of the Department of Justice in the matter.

It is settled by the cases of *Averill vs. Tucker*, (2 Cranch C. C. Reports, 544,) and of *Buchanan vs. Alexander*, (4 Howard Rep., 20,) that money in the hands of a disbursing agent of the Government is not subject to attachment by creditors of the persons to whom such money is due. Therefore, I am of opinion that this attachment should not prevent the postmaster at New York from paying Mr. Strong in accordance with the directions which the Post-Office Department has given.

The district attorney at New York will be directed to defend the postmaster in any legal proceedings against that officer growing out of the attachment.

The papers inclosed in your communication are herewith returned.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. J. A. J. CRESWELL,

Postmaster-General.

Attorney-General.

ATTORNEY-GENERAL.

It is not the duty or the practice of the Attorney-General to officially answer abstract or hypothetical questions of law.

DEPARTMENT OF JUSTICE,

January 8, 1872.

SIR: Your letter of October 3 propounds to me certain inquiries in relation to the duty of Treasury officers and disbursing officers.

These questions are of a general nature, and it is not shown that they have arisen in the administration of the Treasury Department.

According to settled practice, the Attorney-General is not required to answer abstract or hypothetical questions, and therefore I respectfully defer an answer to your inquiries until shown that they arise in the administration of the Treasury Department, and grow out of some specific state of facts.

Very respectfully, your obedient servant,

A. T. AKERMAN.

Hon. GEORGE S. BOUTWELL,

Secretary of the Treasury.

OPINIONS
OF
OFFICERS OF THE DEPARTMENT OF JUSTICE,

*APPROVED BY THE ATTORNEY-GENERAL.

RECOVERY OF CONFEDERATE PROPERTY.

Under the joint resolution of June 21, 1870, the Secretary of the Treasury has power to enter into contracts for the recovery of real estate alleged to have been conveyed to the so-called Confederate States, but which is now in the occupancy of private individuals.

In such contracts the Secretary may stipulate to allow as compensation for the service a portion of the proceeds realized from the property recovered.

DEPARTMENT OF JUSTICE,

August 11, 1870.

SIR : The letter of Hon. W. A. Richardson, Acting Secretary of the Treasury, dated the 9th instant, having been referred to me for examination of the questions of law involved therein, I herewith submit to you the following opinion :

The first question is as follows : " Whether or not the Secretary of the Treasury has power, under the provisions of the joint resolution of Congress approved June 21, 1870, (16 Stat., 380,) to enter into contracts for the purpose of recovering such estate," namely, " real estate alleged to have been

* Section 4 of the act of June 22, 1870, establishing the Department of Justice, (16 Stat., 162,) provides : "That questions of law submitted to the Attorney-General for his opinion, except questions involving a construction of the Constitution of the United States, may be by him referred to such of his subordinates as he may deem appropriate, and he may require the written opinion thereon of the officer to whom the same may be referred ; and if the opinion given by such officer shall be approved by the Attorney-General, such approval, so indorsed thereon, shall give the opinion the same force and effect as belong to the opinions of the Attorney-General."

Recovery Confederate Property.

conveyed to the so-called Confederate States, but now occupied by private individuals, the United States having no present knowledge or evidence of its title thereto." In my opinion the question should be answered in the affirmative. The statute authorizes the Secretary of the Treasury to make contracts "for the preservation, sale, or collection of *any property*," which term, of course, includes real as well as personal property. A qualification of this comprehensive term is to be found in the subsequent words, "which may have been wrecked, abandoned, or derelict." That the word "derelict" is here used in a sense applicable to real estate may be doubtful, perhaps; but in view of the legislation of Congress enacted since the "so-called Confederate States" first began to exist, there can be little doubt that the preceding word, "abandoned," may be applied to real property.

The act "for the collection of the direct tax in insurrectionary districts," of June 7, 1862, (12 Stat., 424,) in its 9th section makes provision for "cases where the owners of said lots and parcels of ground have abandoned the same."

By the act of July 2, 1864, (13 Stat., 375,) authority was given to lease "abandoned lands;" and in its 3d section the term "property," as used in other statutes, was enlarged, in order that it might include real as well as personal property without distinction.

An act of March 3, 1865, (13 Stat., 507,) established "a Bureau of Refugees, Freedmen, and *Abandoned Lands*," and for the supervision, management, and disposal of such "abandoned lands" made provision.

The apparent purpose of the act of June 21, 1870, to secure and make available neglected interests of the United States in property "lately in possession of the so-called Confederate States," cannot be completely carried out except by the adoption of this larger signification of the word "property;" and if there were more doubt than I entertain upon this point, it would be proper to solve that doubt in extension of the power granted, to the end that the obvious purpose of this legislation may be fully executed.

The second question is: "Such power being conceded, whether or not, in such contracts, the Secretary may properly stipulate to pay to the persons furnishing information as

Recovery of Confederate Property.

above a portion of the proceeds ‘realized and received from the property’ so recovered?” This also, in my opinion, should be answered in the affirmative. The act under consideration authorizing the Secretary of the Treasury to make contracts in relation to certain property, and therein to allow compensation to persons “giving information thereof,” would, without further restriction, authorize the Secretary of the Treasury to create what might be called a general liability on the part of the United States to pay the compensation agreed upon, a liability which the Government would not deny, though in order to its discharge an appropriation of money by Congress might be necessary.

But by the proviso which concludes the act, the authority to create such general liability is taken away; and it is enacted that, in the contracts authorized, no cost or claim upon the United States is to be created, “which shall not be paid from such moneys as shall be realized and received from the property so collected under such specific agreement.” All modes of payment *other than from moneys realized from property secured under such specific agreement being prohibited*, there would seem to be no ground for doubt that an agreement to pay in this mode was authorized—specially and solely authorized—by the act in question.

Very respectfully,

THOMAS H. TALBOT,
Assistant Attorney-General.

Hon. A. T. AKERMAN,
Attorney-General.

Approved:

A. T. AKERMAN.

Internal Revenue.

INTERNAL REVENUE.

The proprietors of coasting vessels, and vessels running upon the rivers and inland lakes, engaged in the carrying or delivery of money, valuable papers, or any articles for pay, whose gross receipts therefrom exceed one thousand dollars per annum, are liable to the special tax imposed on express carriers and agents by paragraph 50 of section 79 of the act of June 30, 1864, as amended by the act of July 13, 1866.

DEPARTMENT OF JUSTICE,
November 8, 1870.

SIR: I have examined the question submitted to this Department by the letter of the honorable Secretary of the Treasury of the 4th instant, and by the Attorney-General referred to me, viz., "whether coasting vessels and vessels running upon the rivers and inland lakes are liable to the special tax imposed by paragraph 50 of section 79 of the internal-revenue act of June 30, 1864, as amended on July 13, 1866," (14 Stat., 121,) and have the honor to submit my opinion as follows:

The paragraph in question imposes a special tax on every person, firm, or company engaged in the carrying or delivery of money, valuable papers, or any articles for pay, or doing an express business, whose gross receipts therefrom exceed the sum of one thousand dollars per annum.

In considering the question submitted by the Secretary of the Treasury it is not necessary to inquire whether the proprietors of such vessels are express carriers in the usual acceptation of that term. Do they engage in the carrying or delivery of money, valuable papers, or any articles for pay, and do their gross receipts therefrom exceed the sum of one thousand dollars per annum? If so, they are literally embraced by this statute, and it can make no difference that the carrying is on water instead of on land.

The language of the statute is entirely clear and free from all ambiguity. It contains no exception in favor of watercrafts, whether enrolled and licensed, or otherwise. The obvious purpose of the first proviso in the paragraph in question is to prevent the duplication of the special tax on

Internal Revenue.

the same person, firm, or company on a continuous route, and of the second proviso to relieve from this special tax draymen and teamsters owning only one dray or team. These are the only exceptions or limitations mentioned in this section, and I am aware of no other section of the statute creating additional exceptions, or imposing other limitations.

The last proviso to section 103 of the act of June 30, 1864, as amended on July 13, 1866, and March 2, 1867, exempts from enrollment-fees or tonnage-tax certain vessels therein named, and requires them to pay, in lieu of such fees and tax, an annual special tax at the rate of five dollars for each boat of the capacity of exceeding twenty-five tons and not exceeding one hundred tons. It will be observed that the annual special tax imposed by the last-named section is a tax upon the vessel itself, and not upon the business of the proprietors. This annual special tax, by the very terms of the section, is in lieu of enrollment-fees or tonnage-tax, and not in lieu of any tax imposed by any other section of the internal-revenue law. It is clear that this annual special tax imposed by section 103, *supra*, is not inconsistent with the tax imposed on express carriers and agents by paragraph 50 of section 79 of internal-revenue act of June 30, 1864, as amended on July 13, 1866.

It is therefore my opinion that the proprietors of coasting vessels, and vessels running upon the rivers and inland lakes, engaged in the carrying or delivery of money, valuable papers, or any articles for pay, whose gross receipts therefrom exceed the sum of one thousand dollars per annum, are liable to the special tax of ten dollars imposed on express carriers and agents by the paragraph last mentioned.

Very respectfully, your obedient servant,

B. H. BRISTOW,

Solicitor-General.

Hon. A. T. AKERMAN,

Attorney General.

Approved November 8, 1870:

A. T. AKERMAN.

Restamping Distilled Spirits.

RESTAMPING DISTILLED SPIRITS.

The Commissioner of Internal Revenue has no authority to direct the restamping of distilled spirits and fermented liquors where the stamp previously affixed has become detached and destroyed without the fault of the distiller.

Semblé, however, that where the distiller, in consequence of the destruction of the stamp, is forced to affix a new one, the Commissioner, upon ~~E~~ proof of these facts, may direct the price of the second stamp, or, rather, the tax thus a second time exacted, to be refunded, under the power given him to refund taxes illegally assessed.

DEPARTMENT OF JUSTICE,
May 8, 1871.

SIR : I beg leave to submit the following opinion upon the question referred by you to me of how far the Commissioner of Internal Revenue has authority to direct the restamping of casks of distilled spirits and fermented liquors where the stamp has become detached and destroyed without fault on the part of any one.

By the act of July 20, 1868, (15 Stat., 125,) provision was first made for the collection of the duties upon liquors and tobacco by means of revenue stamps. By the provision of that act the form of the stamps for spirits is carefully prescribed, and detailed directions are given in respect to the manner in which it shall be affixed. No provision is made for the case of the destruction of the stamp without fault on the part of the distiller.

Section 26 provides : "That all stamps required for distilled spirits shall be engraved in their several kinds in book form, and shall be issued by the Commissioner of Internal Revenue to any collector, upon his requisition, in such numbers as may be necessary in the several districts. Each stamp shall have an engraved stub attached thereto, with a number thereon corresponding with an engraved number on the stamp, and the stub shall not be removed from the book. And there shall be entered on the corresponding stub such memoranda of the contents of every stamp as shall be necessary to preserve a perfect record of the use of such stamp when detached."

Restamping Distilled Spirits.

Section 27 enacts: "That every stamp for the payment of tax on distilled spirits shall have engraved thereon words and figures representing a decimal number of gallons, and a similar number of gallons shall be engraved on the stub corresponding to such stamp, and between the stamp and the stub, and connecting them, shall be engraved nine coupons, which, beginning next to the stamp, shall indicate in succession the several numbers of gallons between the number named in the stamp and the decimal number next above. And whenever any collector shall receive the tax on the distilled spirits contained in any cask, he shall detach from the book a stamp representing the denominative quantity nearest to the quantity of proof spirits in such cask, as shown by the gauger's return, with such number of the coupons attached thereto as shall be necessary to make up the whole number of proof gallons in said cask."

Section 28 enacts: "That the books of tax-paid stamps issued to any collector shall be charged to his account at the full value of the tax on the number of gallons represented on the stamps and coupons contained in said books; and every collector shall make a monthly return to the Commissioner of Internal Revenue of all tax-paid stamps issued by him to be affixed to any cask or package containing distilled spirits, on which the tax has been paid, and account for the amount of the tax collected."

The question presented for your opinion seems to be, whether any of these stamps can be used for the purpose of restamping spirits under direction of the Commissioner of Internal Revenue, where the stamp previously affixed thereto has become destroyed without the fault of the distiller, and such use of stamps be allowed in settling the accounts of collectors?

This case is clearly not directly provided for by law. Whether power to direct such a restamping of spirits is given to the Commissioner of Internal Revenue by implication from all the provisions of the statute, is perhaps a more difficult question. No tax is required to be paid more than once, and, while the law requires a stamp to be affixed to spirits, as the only legal evidence of the payment of the tax, there is no provision making the stamp the sole and conclusive evi-

Restamping Distilled Spirits.

dence that the tax has been paid, or, in other words, making the tax-payer the insurer of the stamp affixed by the revenue officers to the casks of spirits. It would require the most unequivocal legislation to make such a stamp more than *prima facie* evidence of the payment of the tax, or to compel a tax to be paid a second time because the stamp has been lost without fault on the part of a tax-payer. Nevertheless a stamp is required, and the very minute regulations with respect to the manner in which stamps shall be issued to collectors, and in which they shall be used, and the use of them be accounted for, would seem to exclude any implication of an authority in any one to direct their use in a different mode or for different purposes from those pointed out.

I am of opinion that the remedy for the injustice which would follow from compelling a manufacturer to pay a tax a second time, because the stamp has been destroyed without fault on his part, is to be found in the power of the Commissioner of Internal Revenue to refund taxes wrongfully assessed. Power to do this is given him in language which is unquestionably broad enough to include such a case as this, (13 Stat., 239, 240.) Where a stamp has been destroyed, and the tax-payer, in consequence, is forced to affix a new stamp, the Commissioner, upon proof of these facts, clearly has power to direct the price of the second stamp, or rather, the tax thus a second time exacted, to be refunded ; and this would seem to be the most legitimate way of meeting the difficulty, until there can be legislation by Congress.

Your very obedient servant,

CLEMENT HUGH HILL,

Assistant Attorney-General.

Hon. A. T. AKERMAN,

Attorney-General.

Approved May 8, 1871 :

A. T. AKERMAN.

Board of Health of the District of Columbia.

BOARD OF HEALTH OF THE DISTRICT OF COLUMBIA.

The Board of Health of the District of Columbia, in the absence of any statutory provision on the subject, has of necessity an inherent power to appoint officers necessary to its complete organization, such as a clerk or secretary.

The board may not only declare what shall be deemed nuisances, but provide by contract or otherwise for the removal of nuisances, if necessary, at the expense of the District.

Seemle that the power given to the board to make and enforce regulations is confined to preventing domestic animals running at large in the streets, and the sale of unwholesome food ; but that this power includes the power to fix penalties for the violation of such regulations, at least in the absence of any legislation on the subject.

The enforcement of such penalties, however, must be through the ordinary tribunals and magistracy of the District.

DEPARTMENT OF JUSTICE,
June 8, 1871.

SIR : I have considered the questions submitted to the Attorney-General by the Secretary of the Treasury in regard to the powers of the Board of Health of the District of Columbia, which were referred by you to me. The questions asked are as follows :

1. "What is the authority and what are the powers of the Board of Health of the District of Columbia, under the 26th section of the act of Congress entitled 'An act to provide a government for the District of Columbia ?'

2. "Have the Board of Health power, in carrying out the provisions of the law creating it, to provide for and appoint officers, whether the same be of its own number, or persons outside of the board ?

3. "Is the board authorized and empowered to establish and collect charges, or expend the same in the payment of agents or officers or to carry out the general provisions of the law ; or to make contracts ?

4. "Is the board authorized to declare what shall be deemed nuisances, and for the violation of its ordinances in regard thereto, to wit, for the committing, keeping, or maintaining nuisances, to impose and collect fines according to the actual methods employed in the District of Columbia ?"

Board of Health of the District of Columbia.

The Board of Health was created by section 26 of the act of February 21, 1871, entitled "An act to provide a government for the District of Columbia," (16 Stat., 419,) the language of which is as follows: "There shall be appointed by the President of the United States, by and with the advice and consent of the Senate, a Board of Health for said District, to consist of five persons, whose duty it shall be to declare what shall be deemed nuisances injurious to health, and to provide for the removal thereof; to make and enforce regulations to prevent domestic animals from running at large in the cities of Washington and Georgetown; to prevent the sale of unwholesome food in said cities; and to perform such other duties as shall be imposed upon said board by the legislative assembly."

As it is understood that there is some difference of opinion existing between the legislative assembly of the District of Columbia and the Board of Health, in regard to the authority and powers of the latter, I do not deem it proper for this Department to attempt to answer so vague and general a question as the one first proposed.

Upon the second question, I am of opinion that the Board of Health, in the absence of other statute provision, like any other organized body, has an inherent power to appoint a clerk or secretary to perform the usual duties of such an officer. The power to appoint officers necessary to its complete organization, must of necessity exist where no other provision has been made therefor, in a body established for such purpose as the Board of Health is. But, beyond the appointment of such officers, I do not find any authority given to the Board of Health to appoint officers.

In answer to the third question, I am of opinion that, under the duty imposed upon the Board of Health, "to declare what shall be deemed nuisances injurious to health, and to provide for the removal thereof," the board has power, not only to declare what shall be deemed nuisances, but to provide by contract or otherwise for the removal of anything pronounced by it to be a nuisance, if necessary, at the expense of the District.

The fourth inquiry involves a question of much difficulty, and upon which I express an opinion with much reluctance

Board of Health of the District of Columbia.

and with great caution. The section before cited gives the Board of Health power "to make and enforce regulations to prevent domestic animals from running at large in the cities of Washington and Georgetown, to prevent the sale of unwholesome food in said cities." Rejecting punctuation, which constitutes no part of a statute, and supplying the conjunction, "and" before the last part of this sentence, as I think we must to give effect to the intention of Congress, it is clear that the power given to the Board of Health to make and enforce regulations is confined to preventing domestic animals running at large in the streets, and the sale of unwholesome food. But the further question arises, and the one of real difficulty, whether the power to make and enforce regulations includes the power to fix penalties for the violation of such regulations. Upon full consideration, I am of opinion that such power does exist in the Board of Health, at least in the absence of any legislation on the subject. Although the fixing of penalties for the violation of any ordinance or regulation is, in one sense, legislation, and, therefore, pertaining rather to a legislative body than to a body like the Board of Health, yet the power to fix some kind of punishment for the violation of police regulations, where there is no other provision therefor, either in the fundamental law of the District, or in any law enacted by the legislative assembly, would seem naturally to belong to the body which has the power to establish such regulations, and may be considered as no more an act of legislation than the regulations themselves. The enforcement of such regulations must, of course, be through the ordinary tribunals and magistracy of the District.

I have considered it my duty, in stating my conclusions upon this subject, to confine myself with the utmost strictness to answering the questions propounded to the Attorney-General, and to express no opinion upon any matter not directly and explicitly included within those questions which I have answered.

It may be well, however, to add, in conclusion, that the powers and duties of the Board of Health are stated in the fundamental law of the District with great brevity and vagueness, and it was evidently the expectation and inten-

Compensation of Counsel.

tion of Congress that the necessary legislation and official machinery for carrying out the purposes for which the board is established, as well as appropriations for the expenses incident to its duties, should be provided by the legislative assembly of the District.

I have the honor to be, &c.,

CLEMENT HUGH HILL,

Assistant Attorney-General.

Hon. B. H. BRISTOW,

Solicitor-General, and Acting Attorney-General.

Approved:

B. H. BRISTOW,

Solicitor-General, and Acting Attorney-General.

COMPENSATION OF COUNSEL.

Where an assistant United States attorney was employed by the Secretary of War, before the passage of the act establishing the Department of Justice, (16 Stat., 162,) to perform certain professional services in connection with the purchase of certain land under the direction of the Department of War : *Held*, 1st. That as the employment was prior to the date of the act, its provisions had no application to the case. 2d. That the services were not such as the United States attorney, or his assistant, was obliged to discharge, and that the Secretary of War was authorized to employ either as special counsel and allow a compensation therefor. Such peculiar service as the examination of a title to land is not within the spirit, or, necessarily, the letter of section 17 of said act ; and it is competent to the head of a Department, in his discretion, to employ a conveyancer, or an attorney, to examine titles, notwithstanding the provisions of that act.

Where, after the said act took effect, counsel were employed by the military authorities to appear in court in certain *habeas-corpus* cases : *Held* that the Secretary of War had no authority to employ such counsel without the consent of the Attorney-General, and that a claim for their services can only be allowed on the approval of the latter.

DEPARTMENT OF JUSTICE,

June 19, 1871.

SIR : I have considered the two questions of compensation of counsel, submitted for the opinion of the Attorney-General by the Secretary of War in his letter of the 13th instant.

The first is in regard to the claim of Simeon E. Baldwin,

Compensation of Counsel.

esq., assistant United States attorney for the district of Connecticut, for professional services during the year 1870, in connection with the purchase of land at Fort Hale by the War Department.

As Mr. Baldwin was employed before the passage of the act establishing the Department of Justice, the provisions of the act, according to the settled practical construction of this office, does not apply to his case. Attorney-General Speed, in an opinion to the Secretary of War, dated March 8, 1866, (11 Opins., 433,) held that a district attorney was entitled to compensation for examining the titles to land purchased for the Government; and Mr. Browning, in an opinion to the Secretary of War, dated June 12, 1868, (12 Opins., 416,) affirming this and other opinions of this office, held that the Secretary of War had a right to employ and pay special counsel for examining titles to land purchased under the direction of his Department. There can be no doubt of the correctness of their decisions. Mr. Baldwin's services seem to have been confined to drawing and procuring the passage of an act, through the legislature of Connecticut, ceding jurisdiction of the land bought to the United States, and examining the title to such land. These were clearly services which the district attorney was not obliged to perform, and which the Secretary of War was authorized to remunerate him for performing, or else to employ other counsel, at his discretion. What fee shall be paid to him is a matter under the exclusive control of the Department which employed him. (See opinion of Mr. Browning, 12 Opins., 401.) This disposes of Mr Baldwin's account.

The second is in regard to the acting United States district attorney for Michigan, for services in behalf of the military authorities, by appearing in certain *habeas-corpus* cases during the year 1871, after the act establishing the Department of Justice went into operation.

By section 17 of that act it is enacted "That it shall not be lawful for the Secretary of either of the Executive Departments to employ attorneys or counsel at the expense of the United States; but such Departments, when in need of counsel or advice, shall call upon the Department of Justice, the officers of which shall attend to the same; and hereafter no counsel or

Compensation of Counsel.

attorney fees shall be allowed to any person or persons, besides the respective district attorneys and assistant district attorneys, for services in such capacity to the United States, or any branch or Department of the Government thereof, unless hereafter authorized by law, and then only on the certificate of the Attorney-General that such services were actually rendered, and that the same could not be performed by the Attorney-General, or Solicitor-General, or the officers of the Department of Justice, or by the district attorneys." The section further enacts that "every attorney and counsel who shall be specially retained under the authority of the Department of Justice to assist in the trial of any case in which the Government is interested, shall receive a commission from the head of said Department as a special assistant to the Attorney-General, or to some one of the district attorneys, as the nature of the appointment may require." (16 Stat., 164, 168.)

As the Secretary of War requests an opinion in regard to his powers to employ counsel under this act, I have considered the question of the applicability of the statute, not only to the case last submitted, but also to the case of the examination of a title to land bought by the War Department.

Upon careful consideration I am of opinion that such peculiar service as the examination of a title to land is not within the spirit, or, necessarily, the letter of the section above quoted. Such services generally require special and peculiar knowledge. Although very often, if not most frequently, performed by members of the bar, yet they are not necessarily so. Indeed, in some parts of the country they are performed by professional conveyancers, who have never been admitted to practice as counsel.

I understand that it has always been the practice to treat the expenses of such services as a part of the incidental expenses connected with the purchase of the land, and to pay for them out of the money appropriated for such purpose; and when I consider what a variety of circumstances attend the purchase of land for the Government, how peculiar the services under many circumstances may be, and how important it is that these services should be performed by persons thoroughly conversant with the titles which they undertake to examine, and that the persons best acquainted therewith

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may very possibly not be members of the bar, I think that the practice which has heretofore prevailed is a very proper one, and the continuance of it would not violate any provision of law.

No one will pretend that the section above quoted applies to services rendered by a person not an attorney or counselor, even if *quasi-professional*. Certainly, if this be so, the circumstances that they may be performed by an attorney or counselor does not render them legal services within the meaning of the act establishing the Department of Justice; for if this were so, it would follow that the provision forbidding any Executive Department "to employ attorneys or counsel at the expense of the United States," would forbid their employing anybody who had ever been admitted to the bar, for any service whatsoever, no matter how remote it might be from what are called legal services.

As such persons are not required to appear in court, it is not necessary that they should receive a commission from the head of this Department as assistant to the Attorney-General or district attorney, because that provision is strictly limited to persons who are retained "to assist in the trial of any case." Construing this provision of the section with the previous one, strengthens my conclusion that the services of a conveyancer are not included within its terms, and that, therefore, the Secretary of War may, in his discretion, employ conveyancers to examine titles, notwithstanding the provisions of this act.

But, on the other hand, I am clearly of opinion that the case of counsel appearing in court in behalf of the military authorities on a case of *habeas corpus* falls within the section above quoted, and that the Secretary of War has no authority to employ such counsel without the consent of the Attorney-General, and that, if such counsel be not legal officers of the United States, it is necessary that they shall be specially commissioned under the provisions of the act. The claim, therefore, of the acting United States district attorney for Michigan is a claim for legal services which can only be allowed by the Attorney-General. Where, however, the omission to receive a commission as special assistant, and to take the oath accordingly was not intentional, I do not think

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that it will prevent the allowance of a claim for compensation for services actually rendered, and rendered in good faith.

I have the honor to be, &c.,

CLEMENT HUGH HILL,

Assistant Attorney-General.

Hon. B. H. BRISTOW,

Solicitor-General, and Acting Attorney-General.

Approved:

B. H. BRISTOW,

Solicitor-General, and Acting Attorney-General.

REMOVAL OF SUITS AGAINST INTERNAL-REVENUE OFFICERS.

The provisions of section 67 of the act of July 13, 1866, (14 Stat., 171,) for the removal of suits against internal-revenue officers, have no application to suits brought against such officers in the Territories.

DEPARTMENT OF JUSTICE,

August 28, 1871.

SIR: I have duly considered the question submitted to you by the Secretary of the Treasury by his letter of the 9th instant, in regard to a suit brought in the Territory of Montana against the collector, assessor, and assistant assessor of internal revenue, by Andrew J. Davis, to recover the taxes assessed and collected from him.

The suit, as I understand it, is brought in a district court of the Territory, and the question is, whether it can be removed to the United States district or circuit court under section 67 of chapter 184 of the acts of 1866. (14 Stat., 171.)

By the fundamental law of the Territory, section 9, (13 Stat., 88, 89,) it is enacted that "the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace;" that "the said Territory shall be divided into three judicial districts, and a district court shall be held in each of said districts by one of the justices of the supreme court at such times and places as may be prescribed by law. * * * Writs of error, bills of exceptions, and appeals shall be allowed in all cases from the final decisions of said district courts to the supreme court

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under such regulation as may be prescribed by law. * * * Writs of error and appeals from the final decisions of said supreme court shall be allowed, and may be taken to the Supreme Court of the United States in the same manner and under the same regulations as from the circuit courts of the United States," where the value of the property shall exceed one thousand dollars. "And each of the said district courts shall have and exercise the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the circuit and district courts of the United States. * * * Writs of error and appeal in all such cases shall be made to the supreme court of said Territory the same as in other cases."

By section 10 it is enacted that the marshal of the Territory, who is appointed by the President, "shall execute all processes issuing from the said courts when exercising their jurisdiction as circuit and district courts of the United States."

Section 67 of the act of 1866, *ubi supra*, enacts that, in any case, civil or criminal, where suit or prosecution shall be commenced in any court of any State against any officer of the United States, appointed under or acting by authority of the internal-revenue act, "it shall be lawful for the defendant in such suit or prosecution, at any time before trial, upon a petition to the circuit court of the United States in and for the district in which the defendant shall have been served with process, setting forth the nature of said suit," &c., to have the case removed to said court. Provision is further made that the case shall be entered on the docket of said court, and be thereafter proceeded in as a cause originally commenced therein; "and it shall be the duty of the clerk of said court, if the suit were commenced in the court below by summons, to issue a writ of *certiorari* to the State court, requiring said court to send to the said circuit court the record and proceedings in said cause; or, if it were commenced by *capias*, he shall issue a writ of *habeas corpus cum causa*, a duplicate of which said writ shall be delivered to the clerk of the State court, or left at his office by the marshal of the district or his deputy, or some person duly authorized thereto; and thereupon it shall be the duty of said State court to

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stay all further proceedings in such cause, and the said suit or prosecution, upon delivery of such process, shall be deemed and taken to be moved to the said circuit court, and any further proceedings, trial, or judgment therein in the State court shall be wholly null and void."

I am of opinion that this section does not apply to suits brought against revenue officers in Territories.

In the first place, the reason for removing a case against a revenue officer from a State court, in which the judge who presides at the trial and all the officers of the court are State officers, and hold their commissions entirely independently of any authority of the United States, does not exist in the case of a court in a Territory created by United States laws, presided over by a judge appointed by the President of the United States, and all the proceedings in which are regulated by the acts of Congress establishing the Territory, and any other acts which Congress may see fit to pass amendatory thereof.

In the second place, the provision in respect of the removal of actions from State courts will not apply to the case of an action brought against a United States officer in a territorial court created by act of Congress. That provision is confined to suits "in any court of any State." Further provision is made for the removal of a case from one court to another; but in this case, not only is the court not a court of "any State," but the same court, consisting of the same judge and the same clerk, has jurisdiction both of cases arising under the territorial laws, and of cases arising under United States laws. Consequently, there could be no removal, but merely a transfer, as it were, from one docket of the court to another docket.

This case, therefore, does not come within the exact letter of the statutes, nor do I think it can be considered as coming within it by implication. The Supreme Court of the United States has not shown any inclination, in construing section 67 of the act of 1866, to extend it by implication, and I think there is nothing which would justify so liberal, indeed, I might say so forced, a construction as to extend the provisions of that section to the courts of the Territories of the United States.

Removal of Suits against Internal-Revenue Officers.

I have referred to the act of 1864, chapter 183, section 182, (13 Stat., 306,) which provides, "that whenever the word 'State' is used in this act, it shall be construed to include the Territories and District of Columbia, where such construction is necessary to carry out the provisions of this act."

Passing by the first obvious question arising, viz., whether this section applies to the act of 1866, I am clearly of opinion that it does not alter the construction which I have placed upon section 67 of the last-named statute. The word "State" is to be construed to include the Territories, where such construction is necessary to carry out the provisions of that act. We must, therefore, seek by reference to the subject-matter to discover whether such a broad construction of this word is necessary to carry out the provisions of the act. As I am of opinion that neither the reason nor the letter of section 67 applies to Territories, and as that section can have full and efficient operation without such a broad construction of the word "State," it follows that such construction is not necessary to carry out the provisions of the act, and, therefore, section 182 of the act of 1864 does not apply to it.

For a general discussion of this principle, I beg leave to refer to the recent English case of *Charlton vs. Lings*, (Law Rep., 4 C. P., 374,) in which it was held that under the reform act of 1867 women had not a right to vote, notwithstanding an act of Parliament that in all acts words importing the masculine gender shall be deemed and taken to include females, unless the contrary is expressly provided.

I have the honor to be, &c.,

CLEMENT HUGH HILL,

Assistant Attorney-General.

Hon. A. T. AKERMAN,

Attorney-General.

DEPARTMENT OF JUSTICE,

August 29, 1871.

The foregoing opinion is approved.

A. T. AKERMAN.

Case of J. W. Wright.

CASE OF J. W. WRIGHT.

W. having been constituted an attorney by certain Indians to collect from the Government claims for back pay and bounty due them for military services, he was, upon executing a bond to the United States conditioned for the faithful performance of his duties as such attorney, and filing the same in the Interior Department, also empowered as a special agent of that Department, without compensation, (except such fees as were then or might thereafter be authorized by said Department,) to collect and pay over to the said Indians their claims. The appointment as such special agent was not made in pursuance of any law of Congress: *Held* that W. did not become, by virtue of that appointment, or by the execution of the bond, an officer of the United States within the meaning of section 16 of the act of August 6, 1846, and subject to prosecution thereunder; but *advised* that the Secretary of the Interior may proceed by civil action on the bond for any breach of its conditions, and seek the recovery of whatever damages, if any, the Government has thereby sustained.

DEPARTMENT OF JUSTICE,

December 21, 1871.

SIR: I have examined the papers in the case of J. W. Wright, referred to me by you, with request for my opinion upon the following questions, viz.: 1st. Upon the facts stated in the letter of Hon. J. D. Cox, late Secretary of the Interior, addressed to the Attorney-General, dated September 3, 1870, is the said Wright guilty of embezzlement within the meaning of the 16th section of the act of Congress approved August 6, 1846? 2d. Is the bond executed by said Wright and his sureties a valid obligation upon which the United States may recover and have damages for the alleged breaches thereof?

First. The penal sanction of the 16th section of the act of 1846 is in terms confined to officers of the United States, and other persons charged by that act, or some other act of Congress, with the safe-keeping, transfer, and disbursement of public moneys. It does not appear in this case that Mr. Wright was charged by any act of Congress with the safe-keeping, transfer, or disbursement of public money. In the determination of the question first above presented, it is therefore only necessary to inquire whether he was an officer of the United States.

The duties assigned to Mr. Wright are set forth in the let-

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ter of appointment and instructions to him by the Hon. James Harlan, late Secretary of the Interior, of date July 11, 1866. That letter is as follows:

"It having come to my knowledge that a considerable number of Cherokee, Creek, and other Indians, have appointed you their attorney-in-fact, to collect claims for back pay and bounty for military services rendered the Government of the United States, before the several Departments, and you having filed in this Department a bond in the penal sum of one hundred thousand dollars, conditioned for the faithful performance of your duties, you are hereby authorized and empowered, as a special agent of this Department, without compensation, except such fees as are now or may hereafter be authorized by this Department, to collect and pay over to the parties in cases in which you had been constituted attorney-in-fact as aforesaid, in accordance with the rules prescribed by this Department, the claims of Indians before the several Departments of the Government, upon the following conditions, viz.:

"That you shall pay over promptly all money so collected by you to the parties legally entitled to the same, and, if necessary, go to the Indian country, and tender the same to such soldier or his heirs, less only such commission as is, or may be, fixed by the rules prescribed by this Department for its collection. You to take the receipt of such claimant, witnessed by the United States interpreter and agent for the tribe to which such Indian belongs, and file such receipt with the Commissioner of Indian Affairs; or in case the money is not, for any cause, paid over within the period of four months from the date of its receipt, the same shall be deposited with the Secretary of the Interior; and that in all cases you faithfully conform, in the collection of claims, to such rules as have been or may be hereafter prescribed by this Department.

"This appointment to be revoked at the pleasure of the Secretary of the Interior."

It will be observed that Mr. Wright is distinctly recognized in that letter as the attorney of a considerable number of Creek, Cherokee, and other Indians, for the collection of claims for back pay and bounty for military services rendered

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to the Government of the United States by such Indians; and having executed to the United States a bond in the penal sum of one hundred thousand dollars, conditioned for the faithful performance of his duties as such attorney and agent, he was authorized and empowered as a special agent of the Interior Department, without compensation, except such fees as were then or might be thereafter authorized by said Department, to collect and pay over to the Indians whose attorney he was their claims for military services. This is the whole extent and scope of his authority and power. Does this constitute him an officer of the United States?

In the case of the *United States vs. Hartwell*, (6 Wall., 393,) the Supreme Court said: "An office is a public station or employment, conferred by the appointment of Government. The term embraces the ideas of tenure, duration, emoluments, and duties." So far as can be learned from the papers referred to me, it does not appear to be claimed that Mr. Wright was appointed in pursuance of any law of Congress, or that his compensation was fixed by law, and it seems that he was not to receive any compensation from the United States, but was to be paid, out of the funds collected for the Indians, such fees as the Secretary of the Interior might allow. His appointment was necessarily limited in its duration and specific in its objects. It seems to me, therefore, clear that Mr. Wright did not become, by virtue of this letter of instructions, or by the execution of the bond, or by any other of the acts referred to in the papers before me, an officer of the United States within the meaning of the 16th section of the act of 1846.

It therefore follows that he cannot be successfully proceeded against under that section.

Second. Whatever conflict of opinion may have existed relative to the power of the United States to enter into contracts and to take bonds with surety in the absence of statutory direction, it can no longer be doubted that a bond voluntarily executed to the United States, and founded upon sufficient consideration, and not prohibited by a statute or contrary to public policy, is a valid obligation, whether authorized by statute or not. (*United States vs. Hodson*, 10 Wall., 395.)

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The bond in this case appears to have been required of Mr. Wright, in connection with the appointment conferred upon him, upon the idea that the Government exercises a peculiar guardianship over the Indians, and it was in their interest the bond seems to have been required. While I do not find that the taking of such bond was required or authorized by any statute, it does not appear to have been prohibited by law or by public policy. The bond having been voluntarily executed by Mr. Wright and his sureties, they would be estopped to deny in a civil action the authority of the Secretary of the Interior to take it, or the validity of Mr. Wright's engagement with the United States. What would be the measure of damages, and whether or not the consideration of the bond could be impeached in such a proceeding, are questions which cannot be authoritatively determined otherwise than by a judicial tribunal.

I am, therefore, of opinion that the Secretary of the Interior would be justified in proceeding by civil action on the bond, to hold Mr. Wright and his sureties responsible for any breach of its conditions, and to seek the recovery of whatever damages, if any, the Government has sustained.

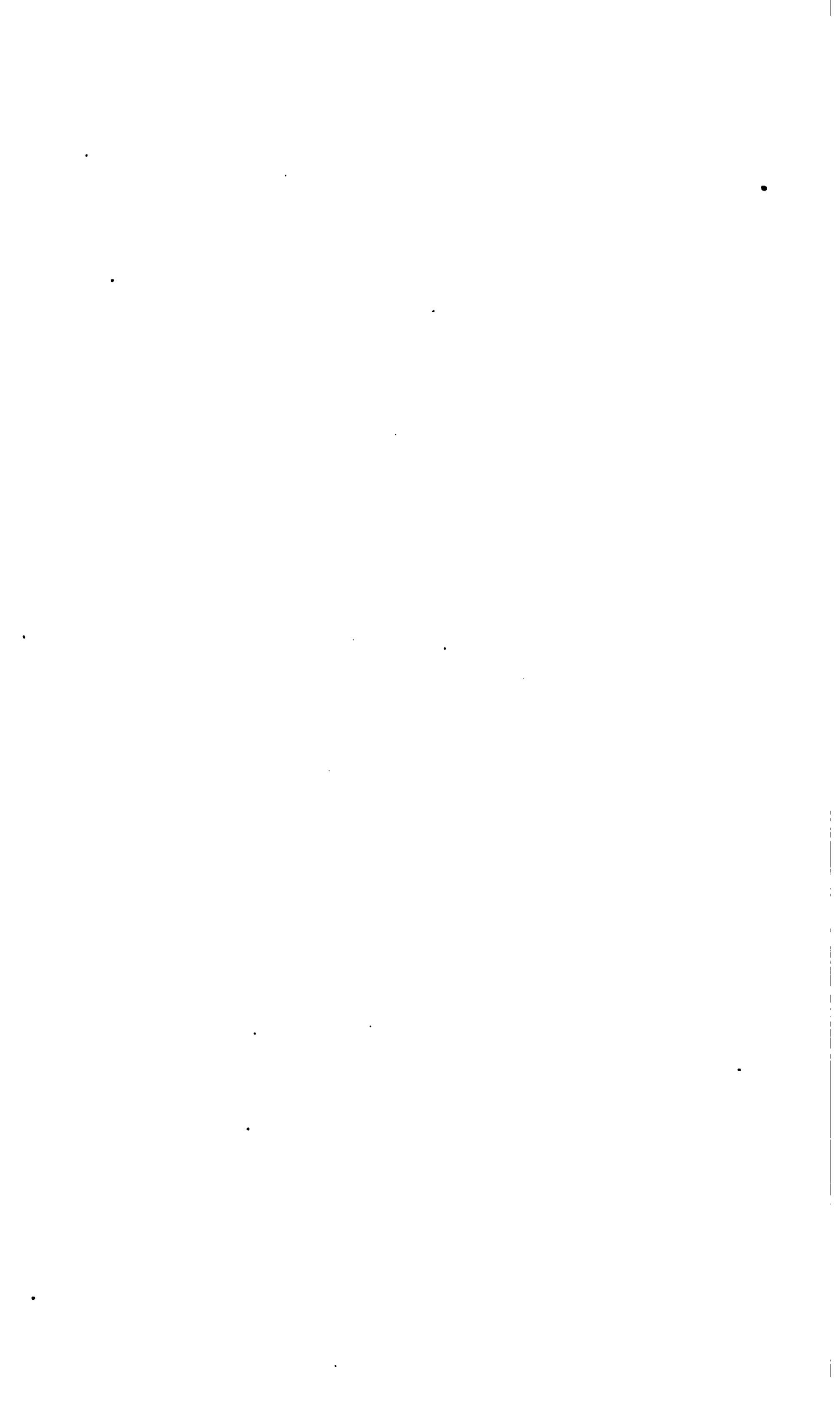
Very respectfully, your obedient servant,

B. H. BRISTOW,
Solicitor-General.

Hon. A. T. AKERMAN,
Attorney-General.

Approved:

A. T. AKERMAN.



INDEX.

ACCOUNTS AND ACCOUNTING OFFICERS.

1. Where a claim or account against the Government, arising in the military service, has been adjusted by the accounting officers of the Treasury, and the balance found due thereon certified by the Comptroller to the War Department for payment, the Secretary of War cannot lawfully withhold his requisition simply on the ground that the balance so certified is in excess of what the officers of his Department deem to be allowable. *Page 5.*
2. Where the question is merely one of computation or amount, the decision of the accounting officers is to be regarded as final. *6.*
3. Provisions of the acts of March 3, 1817, and March 30, 1868, relating to this subject, considered. *Ibid.*
4. Duties of the accounting officers of the Treasury as to the auditing of the accounts of the State of Indiana, under the provisions of the act of March 29, 1867, to re-imburse that State for moneys expended in enrolling and equipping troops to aid in suppressing the rebellion, defined. *218.*
5. In stating an account between the United States and the State of Illinois, under the 2d section of the act of March 3, 1857, the Commissioner of the General Land-Office should debit the United States with 5 per cent. of the sales of the public lands in Illinois, including in the computation all the Indian reservations within the State at the rate of one dollar and a quarter per acre, and then credit the United States with the amount of the 3 per cent. on such sales already paid the State, together with the whole amount of the 2 per cent. fund reserved up to the passage of that act. *267.*
6. The laws, regulations, and departmental practice concerning the settlement of war accounts generally, but more especially of *property* accounts relating to the Army, from the commencement of the Government down to the present time, reviewed. *482.*
7. Under the law as it stood before the passage of the act of March 3, 1817, the settlement of property accounts arising in the military service belonged to an officer in the War Department called the superintendent-general of military supplies, who discharged this duty under the direction of the Secretary of War. *Ibid.*
8. The office of superintendent-general of military supplies was abolished by that act, and, as it seems from the last clause of the 16th section thereof, the legislature contemplated that the duties of that officer touching the settlement of property accounts should thereafter be performed by such of the officers of the Treasury, then created, upon whom was devolved the adjustment of accounts pertaining to the military service. *Ibid.*

ACCOUNTS AND ACCOUNTING OFFICERS—Continued.

9. The subsequent course of departmental regulation and practice has in general coincided with that understanding of the statute, and, moreover, the duty and authority of the accounting officers of the Treasury to settle property accounts relating to the Army have been presupposed and distinctly recognized by subsequent legislation. *Ibid.*
10. Thus, the practice of referring such accounts to those officers for settlement is not founded merely upon departmental usage or departmental regulation, but rests upon direct legislative enactment; and they are to be regarded as authorized *by law* to settle such accounts, until Congress shall otherwise provide. *Ibid.*
11. But the act of 1817 left this duty to be discharged by those officers, as it was previously discharged by the superintendent-general of military supplies—that is to say, under the direction of the Secretary of War; and no alteration of the law in that respect has been made by any subsequent statute. *Ibid.*
12. It follows that the property accounts of quartermasters in the Army should be transmitted from the War Department to the proper accounting officers of the Treasury for settlement, such settlement to be made by them, however, under the direction of the Secretary of War. 483.

See CLAIMS FROM THE INSURRECTIONARY STATES, 2; COMPENSATION, 15.

ADMINISTRATIVE LAW.

1. The deliberate decision of a former administration, of a question involving private rights and interests, (no new facts being shown to exist which were not known when that decision was made,) cannot with propriety be reconsidered by its successors. 33.
2. When a right is created by law and a duty devolved upon an Executive Department under the same law, the enjoyment or enforcement of such right cannot be suspended at the request of a congressional committee. 113.
3. An Executive Department has no right to omit or delay the discharge of the duties imposed upon it by law at the request of a committee of a House of Congress; it can only pay attention to such request when it affects a discretionary power. *Ibid.*
4. When a distribution of the proceeds of a forfeiture under the impost laws had been made and the money paid over by a former Secretary of the Treasury, and no newly-discovered evidence was produced affecting the correctness of the distribution, and no allegation made of fraud or willful concealment of facts: Advised that the present Secretary would not be justified in re-opening the case on the grounds stated, as it is to be presumed that both the law and the facts were correctly decided by his predecessor. 253.
5. A decision made by a former head of a Department, after having heard the parties in interest, and after careful and thorough consideration of the case—there being no allegation that any material

ADMINISTRATIVE LAW—Continued.

fact can be shown which was not before him—should be regarded by his successor as final, and be left undisturbed. 387.

6. The principle that the final decision of a matter before the head of a Department is binding upon his successor in the same Department, under certain well-defined exceptions, has been so frequently declared that it is now entitled to be regarded as a settled rule of administrative law. 456.

See CLAIMS, 10; CLAIM AGENTS, 1, 2, 4; CONTRACT, 12; DISMISSAL OF MILITARY OFFICERS, 3; LANDS, PUBLIC, 4, 5; PACIFIC RAILROADS, 8.

ALASKA.

1. The provisions of the act of July 1, 1870, to prevent the extermination of fur-bearing animals in Alaska, considered and construed with reference to the authority and duty of the Secretary of the Treasury touching the time and mode of executing the same, so far as they relate to the granting of a lease of a right to engage in the business of taking fur-seals on the islands of St. Paul and St. George, and the parties to whom such lease may be granted by him. 274.
2. Proposals for a lease of the exclusive right to take fur-seals upon certain islands off the coast of Alaska, agreeably to the provisions of the act of July 1, 1870, having been solicited by the Secretary of the Treasury, a party, besides other considerations, offered to pay a stated amount on each skin in addition to the revenue tax specified in that act, and also a stated amount for each gallon of oil obtained from the seals: *Held* that those parts of the bid are in conformity to the statute, and would be binding if incorporated in the lease. 293.

ALIENATION OF LAND OWNED BY UNITED STATES.

The Secretary of War cannot grant or convey any interest in land belonging to the United States, except in pursuance of an act of Congress expressly or impliedly authorizing him to do so. 46.

ALLOWANCES TO ARMY OFFICERS.

See ARMY, 23, 24, 29, 30.

APPEALS FROM COMMISSIONER OF PATENTS.

See PATENT LAWS, 3, 4, 5, 6, 7.

APPOINTMENT.

1. The power of appointment conferred by the Constitution is a substantial and not merely a nominal function, and the judgment and will of the constitutional depositary of that power should alone be exercised or have legal operation in filling offices created by law. 516.
2. The right of Congress to prescribe qualifications for office is limited by the necessity of leaving scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment. *Ibid.*
3. Congress may, at its pleasure, distribute the appointment of inferior officers between the President, courts of law, and heads of Depart-

APPOINTMENT—Continued.

ments, or confide the same exclusively to one or more of these depositaries; but it cannot constitutionally vest such appointment elsewhere, directly or indirectly. *Ibid.*

4. Accordingly, an act requiring the President, the courts, and heads of Departments to appoint to office the persons designated by an examining board as the fittest, would be at variance with the Constitution, inasmuch as it would virtually place the power of appointment in that board. *Ibid.*
5. But though the result of an examination before such a board cannot be made legally conclusive upon the appointing power, against its own judgment and will, yet it may be resorted to in order to inform the conscience of that power. *Ibid.*
6. And notwithstanding that the appointing power alone can designate an individual for an office, still, either Congress, by direct legislation, or the President, by authority derived from Congress, can prescribe qualifications, and require that the designation shall be out of a class of persons ascertained by proper tests to have those qualifications. *Ibid.*

See **ARMY**, 9, 10.

ARMY.

1. By the laws and regulations of the military service in force at the passage of the act of March 3, 1869, chap. 124, vacancies in established regiments and corps, to the rank of colonel, were required to be filled by promotion according to seniority, except in case of disability or other incompetency. 13.
2. But these laws and regulations do not confer upon the officer next in the order of succession any right to the vacant place; this he can acquire only by virtue of a new commission. *Ibid.*
3. The 2d and 6th sections of said act operate to prevent the nomination, for promotion, of infantry and staff officers who were eligible to promotion prior to March 3, 1869, except as therein provided. *Ibid.*
4. Regularly, an officer or soldier, upon his discharge from the military service, is entitled to an honorable discharge, unless he is under sentence of dishonorable dismissal, or unless he has been convicted of an infamous offense, and is sentenced to punishment therefor during the remainder of his term of service, or of conduct reflecting upon his military career, such as cowardice, &c., with either of which conditions an honorable discharge would be incompatible. 16.
5. Where an honorable discharge from the military service has in fact been received, and was given by competent authority, the subsequent cancellation of the discharge-certificate, which is only evidence of such discharge, cannot avoid the latter, nor make it capable of modification to the prejudice of the person discharged. *Ibid.*
6. Where nominations of Army officers for promotion, by brevet, had been pending before the Senate prior to the date of the act of March 1, 1869, chap. 52, but were not confirmed by that body until the 3d

ARMY—Continued.

- of March, 1869 : *Held* that, under the operation of the 2d section of that act, if the officers were not nominated by reason of "distinguished conduct and public service in the presence of the enemy," they could not be commissioned. 31.
7. A nomination for brevet promotion, by reason of meritorious service in engagements with the Indians, is within the statute, and, consistently with its provisions, commissions might be issued to any of the officers referred to who may have been thus nominated. *Ibid.*
 8. Such promotion, when made during the existence of Indian hostilities, is to be viewed as conferred "in time of war," within the meaning of the act mentioned. *Ibid.*
 9. The right of an individual to an office in the Army to which he has been nominated and confirmed is not a vested one until his commission has been signed by the President. 44.
 10. Until the commission has been signed, it is within the discretionary power of the President to withhold it. *Ibid.*
 11. The present incumbents of the office of judge-advocate are officers of the Regular Army of the United States, lawfully appointed and commissioned. 96.
 12. Provisions of the act of July 17, 1862, and subsequent statutes relating to these officers, considered. *Ibid.*
 13. Army officers who have been retired from active service by the President under the 12th section of the act of July 17, 1862, cannot be re-instated on the active list, except by a new appointment with the advice and consent of the Senate, and where vacancies on the active list exist which may lawfully be filled. 99.
 14. Such officers can, however, under that section, be assigned by the President to any appropriate duty in any department of the service, and while so assigned and employed they will be entitled to the full pay and emoluments of their respective grades. *Ibid.*
 15. The War Department has power to correct mistakes made in granting discharges to soldiers. 201.
 16. An officer of the Army, who has been retired from active service in accordance with law, cannot be re-instated in his former place by an order of the President, though the vacancy caused by his retirement may not have been filled. 209.
 17. A party having enlisted as a volunteer soldier in the year 1863, was, on the 18th of January, 1866, before the expiration of his term of enlistment, mustered out of service with his company at Fort Monroe, Virginia, but was not paid off, nor was his discharge certificate delivered to him, until he reached Augusta, Maine, on the 25th of January, 1866, to which latter place he had been transported with his company under the orders and control of the military authorities: *Held* that he was not discharged from the service within the meaning of section 2 of the act of August 4, 1854, until the 25th of January. 278.
 18. The "muster-out" of a volunteer soldier cannot be viewed as in itself or by itself a discharge from service; and he is not to be regarded

ARMY—Continued.

- as discharged until he is released from military control and from subjection to the orders of his superior officers. *Ibid.*
19. The provisions of section 18 of the act of June 30, 1871, prohibiting Army officers on the active list from holding any civil office, extend to State offices as well as to offices under the United States, and to those offices for which no compensation is provided as well as to those for which compensation is allowed. 310.
 20. Regimental quartermasters are not officers of the Quartermaster's Department; they are properly staff officers of their respective regiments, who, besides other duties, are charged with the custody and issuing of supplies. 315.
 21. Vacancies which, under section 12 of the act of July 15, 1870, were intended by Congress to be filled by officers placed on the supernumerary list in pursuance of the provisions of that section, comprised only such vacancies as should occur prior to January 1, 1871; hence a vacancy occurring on or after that date was excluded from the operation of the above-mentioned enactment. 380.
 22. The act of July 12, 1870, authorized any officer to be reported under its provisions as unfit for the proper discharge of his duties, either by the *General of the Army*, or by the *commandant of the department* in which the officer was at the time serving; and it was within the competency of the board constituted under that act, in either case, to entertain and pass upon the report so made. 412.
 23. Under the act of July 15, 1870, the allowance to officers in the Army of fuel and quarters in kind for their servants is still authorized to be made. 417.
 24. The same act, however, does not authorize transportation in kind for such servants to be furnished at the expense of the United States, or re-imbursement in money to the officers for the cost thereof. *Ibid.*
 25. The period of service during which those paymasters in the Army who were selected and appointed pursuant to the provisions of the act of July 26, 1866, from the "additional paymasters" created under the 25th section of the act of July 5, 1838, served as such "additional paymasters," should not be taken into account in determining their relative rank as between themselves and other paymasters in the Army whose commissions are of prior date to theirs. 441.
 26. The second proviso to the 13th section of the act of March 3, 1847, by which length of service in the Pay Department, and not date of commission therein, was made to determine relative rank among paymasters, has been superseded by the 1st section of the act of March 2, 1867, which is expressly given a retrospective operation upon all appointments theretofore made under the act of July 26, 1866. *Ibid.*
 27. Except as between such as have the same date of appointment and commission, the act of March 2, 1867, leaves the matter of relative rank to be regulated solely according to the dates of the commissions under which those officers are at the time acting. *Ibid.*

ARMY—Continued.

28. But where they have the same date of appointment and commission the matter is to be determined by length of service, computed according to the provisions of the last-mentioned act. *Ibid.*
29. An officer of the Army, while on leave of absence from his command, in October, 1870, was ordered to serve and did serve on a court-martial; and the court having adjourned *sine die* before the expiration of his leave, he immediately returned to his command: *Held*, 1st, that the officer is not entitled to *per diem* compensation for his service on the court-martial, such allowance being prohibited by the act of July 15, 1870; and, 2d, that he is not entitled to mileage from the place where the court met to the place where his command was stationed, as at the time he was not "an officer traveling under orders," and not within the provisions of the 24th section of that act allowing mileage. 526.
30. Paragraph 900 of the Army Regulations applies to officers who, at the adjournment of the court, should be at post or duty but for the engagement at court, and not to officers who, for the time being, (as is the case with officers on leave,) have no such post or duty. *Ibid.*

See COMPENSATION, 4, 5, 9, 10; DISMISSAL OF MILITARY OFFICERS, 2.

ATTACHMENT.

1. An attachment issued by a State court against money due a contractor with the Post-Office Department, in the hands of a postmaster, should not prevent the latter from paying the contractor in accordance with the directions given by the Department. 566.
2. It is settled that money in the hands of a disbursing agent of the Government is not subject to attachment at the suit of creditors of the parties to whom such money is due. *Ibid.*

ATTORNEY-GENERAL.

1. Where the question proposed related to a matter pending before a court and might be raised there, and was not asked in reference to any action contemplated by the Department which submitted it, the Attorney-General desired to be excused from expressing an opinion thereon. 160.
2. The opinion of the Attorney-General may be required on questions of law arising in the actual administration of the Departments, but not upon hypothetical cases merely. 531.
3. The Attorney-General is not authorized to give an official opinion upon a question concerning the Board of Health of the District of Columbia, such question not arising in the administration of any of the Executive Departments. 535.
4. It is not the duty or the practice of the Attorney-General to officially answer abstract or hypothetical questions of law. 568.

See COMPENSATION, 20.

BOARD OF HEALTH OF THE DISTRICT OF COLUMBIA.

See DISTRICT OF COLUMBIA, 8, 9, 10.

BOARD OF POLICE OF THE DISTRICT OF COLUMBIA.

See DISTRICT OF COLUMBIA, 1.

BOND.

W. having been constituted an attorney by certain Indians to collect from the Government claims for back pay and bounty due them for military services, he was, upon executing a bond to the United States conditioned for the faithful performance of his duties as such attorney, and filing the same in the Interior Department, also empowered as a special agent of that Department, without compensation, (except such fees as were then or might thereafter be authorized by said Department,) to collect and pay over to the said Indians their claims. The appointment as such special agent was not made in pursuance of any law of Congress: *Held* that W. did not become, by virtue of that appointment, or by the execution of the bond, an officer of the United States within the meaning of section 16 of the act of August 6, 1846, and subject to prosecution thereunder; but *advised* that the Secretary of the Interior may proceed by civil action on the bond for any breach of its conditions, and seek the recovery of whatever damages, if any, the Government has thereby sustained. 588.

BOUNTY.

1. Upon the question presented by the Secretary of War, viz., as to the right of a deserter, whether tried and convicted by a court-martial or not, (if, when so tried and convicted, forfeiture of bounty or a dishonorable discharge is no part of the sentence,) on being returned to service and making up the time lost by his desertion, to receive the same bounty as if he had not deserted, or any bounty at all, under the various statutes relating to bounty, the Attorney-General, in view of the fact that cases are pending in the Court of Claims in which substantially the same question must be considered and decided; and which may be ultimately carried before the Supreme Court, gives no opinion, but advises that the existing practice of the War Department in executing the bounty acts be continued until the question is judicially determined. 185. (See also *Note*, p. 188.)
2. The installments of bounty provided by the act of July 4, 1864, which are *not already due and payable* to a soldier at the time he deserts, never become due and payable in case he does not return or is not returned to service, and are not *forfeited* in the legal sense of that word. 188.
3. Nor, in case the deserter returns, or is apprehended and put back into service, are such installments forfeited *on account of desertion* within the meaning of those words in the act of March 21, 1866; because either the soldier, on serving out his term, is entitled to receive them, or they never become due and payable, by reason of his desertion. *Ibid.*
4. But the installments of bounty, *due and payable* at the time of desertion, are forfeited thereby, in both those cases, and become payable

BOUNTY—Continued.

- to the board of managers of the National Asylum for Disabled Volunteer Soldiers under the said act of March 21, 1866. 189.
5. The various statutes relating to bounty reviewed and considered in connection with the Army Regulations relating to forfeiture for desertion. *Ibid.*
 6. The provisions of the 1st section of the act of March 3, 1868, extend to the claims for bounty of soldiers who enlisted under the act of July 4, 1864. 201.
 7. Under the various bounty acts passed from time to time previous to the act of March 3, 1869, soldiers were not in general entitled to receive the whole of the bounty provided for the term of their enlistment until they had actually served out the full term; and the effect of the 1st section of that act is to make an exception in favor of those whose discharges state that they were discharged by reason of the expiration of their term of service, although in fact they did not serve out the full term of their enlistment. *Ibid.*
 8. What the term of enlistment was, in any case, must be ascertained from the enlistment papers, or rolls, or documents, or from any other sources of information which, by law, are evidence of the contract of service; and the soldier should be paid the bounty allowed by law for that period of service, whatever in such case it may be. *Ibid.*
 9. Soldiers who enlisted for three years or during the war, and were discharged by reason of the termination of the war, are to be regarded as having served out the period of their enlistment, and are entitled to the additional bounty granted by the 12th section of the act of July 28, 1866; and their discharges need not state that they were discharged by reason of the expiration of their term of service to entitle them to be paid that bounty. *Ibid.*
 10. Certain enlisted persons, having received bounty-money from the localities to which they were credited, delivered the same to the recruiting officer in compliance with a regulation of the service, and subsequently, on their arrival at the regimental depot, they underwent a re-examination, were rejected on account of disabilities existing prior to their enlistment, and were discharged; afterward, in pursuance of a general order, the money was deposited by the officer in the Treasury to the credit of an appropriation under the control of the War Department; claim being now made for the money: *Held* that the Department cannot lawfully retain it, after deducting therefrom any sums due the United States from the persons referred to. 257.
 11. Where a person, in October, 1864, had enlisted for a term of three years under the act of July 4, 1864, and was discharged in July, 1867, agreeably to the provisions of a general order from the War Department authorizing discharges prior to the expiration of the term of enlistment in certain circumstances in which the soldier would be greatly incommoded by remaining the full term: *Held*, 1st. That if he was discharged with his own consent, his discharge

BOUNTY—Continued.

not stating that it was granted by reason of the expiration of his term, he is not entitled to the last installment of bounty provided by the said act of July 4, 1864. 2d. If he was discharged without his consent, he is entitled to that installment. 3d. If his discharge states that he is discharged by reason of expiration of term of service, he is entitled to the installment by force of section 1 of the act of March 3, 1869. 562.

BREVET COMMISSIONS.

See ARMY, 6, 7, 8.

CATTLE DISEASE.

See SECRETARY OF THE TREASURY, 1, 2.

CITIZENSHIP.

1. Children born abroad whose fathers were, at the time of their birth, citizens of the United States, and had at some time resided therein, are American citizens under the provisions of the act of February 10, 1855, and entitled to all the privileges of citizenship, which it is in the power of the United States Government to confer. 89.
2. But if, by the laws of the country of their birth, such children are subjects of its government, it is not competent to the United States, by legislation, to interfere with that relation while they continue within the territory of that country, or to change the relation to other foreign nations which, by reason of their place of birth, may at any time exist. *Ibid.*
3. A woman born in the United States, but married to a citizen of France and domiciled there, is not "a citizen of the United States residing abroad," within the meaning of those words in the 116th section of the act of June 30, 1864, and the 13th section of the amendatory act of March 30, 1867, relating to internal revenue. 128.
4. All persons who were citizens of Texas at the date of annexation, viz., December 29, 1845, became citizens of the United States by virtue of the collective naturalization effected by that act. 397.
5. Citizens of Texas, thus adopted into the citizenship of the United States, classified and described. *Ibid.*
6. Persons born abroad, who seek passports as citizens of the United States, founded on an alleged Texan citizenship at the time of annexation, may be deemed citizens of the United States and entitled to passports as such, should they be found to belong to any of the classes of Texas citizens here described. *Ibid.*

CIVIL SERVICE EXAMINING BOARD.

See APPOINTMENT, 4, 5.

CLAIMS.

1. The award of the Third Auditor in the claim of J. and R. H. Porter made on the 10th of May, 1861, under the act of March 3, 1849, chap. 129, is no longer of any force. 9.
2. The D., L. and N. Turnpike Company owned a turnpike in Kentucky, over which, during the late rebellion, large numbers of horses, mules,

CLAIMS—Continued.

- and wagons belonging to the United States, employed in transporting military supplies, were driven by the forces engaged in prosecuting the war; and for this use of their road the company were allowed and paid by the War Department one-half the rates of toll as established by the laws of the State, the company, however, receiving the same under protest, and claiming to be entitled to full rates of toll. Demand having since been made by the company for the difference between the amount thus received and the amount thus claimed: *Held* that this is substantially a claim to be paid for damages caused by the operations of war, and that under existing legislation no authority exists for allowing any part of it. 107.
3. No government has ever admitted a strict legal obligation on its part to make full compensation for such injuries as are incidental to the actual operations of war. *Ibid.*
4. Where the loss of a steamboat has been caused by the carelessness of anybody, a claim for its value does not fall within the provisions of the 2d section of the act of March 3, 1849, as amended by the 5th section of the act of March 3, 1863. 119.
5. Where a steamboat, previously insured by her owners, was impressed into the military service of the United States, and while in such service was lost, after which the underwriters paid the amount of their policies to the owners, who subsequently filed a claim against the United States for the value of the steamboat under the act of March 3, 1849, as amended by the act of March 3, 1863, and were allowed and paid the value thereof, less the amount received by them from the underwriters: *Held* that (the loss being such as, had there been no insurance on the steamboat, would have rendered the United States liable to pay her full value to the owners) the contract of insurance between the owners and the underwriters did not affect or diminish the liability of the Government; and that, as against the Government, the underwriters are entitled to be subrogated to the rights of the owners for the amount paid on their policies. 182.
6. A steamboat belonging to a resident of Wheeling, Virginia, (now West Virginia,) was taken by her owner, before the rebellion, to New Orleans, Louisiana, where he remained with her until May, 1861, when he left her in charge of an agent and returned to the former place; she was subsequently captured by a United States gun-boat on Red River, brought back to New Orleans, then in possession of the United States forces, and turned over to and used by the military authorities there until November, 1862, when she was restored to her owner, who now claims compensation for her use under the joint resolution of December 23, 1869: *Held* that, waiving the question whether the boat was not at the time of her capture to be regarded as enemies' property, the claim is not within the purview of that enactment. 280.
7. The proviso of that resolution is to be construed as if it read, "provided that such steamboats or other vessels were in the insurrec-

CLAIMS—Continued.

- tionary districts by virtue of an authority specially appropriate to vessels of the United States within districts in insurrection," &c. *Ibid.*
8. There is nothing in the resolution which warrants its extension to vessels in insurrectionary districts under a charter or contract between private persons, whether made before the rebellion or afterward, or made between rebels, enemies, or loyal persons, such as is ordinarily required for the hiring of vessels, but not such as was specially appropriate for vessels entering the insurrectionary districts. *Ibid.*
 9. Claim for rent of property known as Kalorama, in the District of Columbia, occupied for military purposes during the late rebellion—being for the difference between the rate demanded and the rate already paid to claimant by the Government—*held* not to be valid upon the facts presented. 370.
 10. It appearing in the case of the Nellie Baker that in 1864 a claim for the hire of that steamer was before the Quartermaster-General, and that there was then a discussion between him and the owners as to the amount due; that he finally adjudged the amount due to be \$4,200; and that the owners, though dissatisfied, accepted this sum at the time as all that could be got upon their claims: *Held* that this action is conclusive, so far as the Departments are concerned, such settlements having the character of final judgments. 372.
 11. In a steamboat claim under the 2d section of the act of March 3, 1849, and the 5th section of the act of March 3, 1863, the burden of proof rests on the claimant, and before he can become entitled to compensation for the loss of his property he must prove everything made essential by the act—the ownership, the military service, the destruction, the unavoidable character of the accident, and the entire absence of fault or negligence on his part. 381.
 12. Claimant contracted to transport military supplies, for which service, by the terms of his contract, he was to be paid "according to the actual distance traveled from the place of departure to that of delivery, the distance to be indorsed on the bill of lading by the officer or agent receiving the supplies." Having performed his part of the agreement, claimant received payment according to the distances indorsed on the bills of lading by the proper officer, which were the reputed distances at the date of the contract. From surveys afterward made, it appeared that the actual distances exceeded those indorsed as aforesaid, and claimant asks to be paid for the difference: *Held* that, there being no evidence that either party had in view, when the contract was entered into, any distances other than those which were then currently accepted, the claim is not well founded. 393.
 13. A non-commissioned officer of Illinois volunteers, in the service of the United States, was appointed by the colonel of his regiment to the command of a company on the 6th of March, 1863, to fill a vacancy caused by resignation, and entered upon the duties of his new

CLAIMS—Continued.

position; on the 3d of April, 1863, he was commissioned by the governor of Illinois as captain of said company, to take rank from the date first mentioned; but on account of military operations and other causes beyond his control, he did not receive the commission, nor was he mustered as captain, until the 2d of June, 1863; claim being made by him for compensation as captain from March 6, 1863, to June 2, 1863: *Held* that under the resolutions of July 26, 1866, and July 11, 1870, he is entitled to a captain's pay from the 3d of April to the 2d of June, but that the claim for the other part of the period covered thereby is not well founded. 413.

14. The 2d section of the act of March 3, 1849, providing for payment for certain property lost or destroyed in the military service, is not repealed by the 4th section of the legislative, executive, and judicial appropriation act of July 12, 1870. The repealing clause of the latter section operates exclusively on sections 1 and 7 of the former act. 507.
15. In April, 1865, the marine dock at Mobile, Alabama, with a quantity of lumber and other materials, the whole belonging to the Mobile Marine Dock Company, was seized by the military authorities and used in the Government service until in November, 1865, the materials having been consumed in the mean time, when the dock was turned over to the officers of the company. Claim being made by the latter for the use of the dock and for the value of the materials, &c. : *Held* that the claim originated during the war for the suppression of the rebellion, and that its settlement is prohibited by the act of February 21, 1867. 555.

See ACCOUNTS AND ACCOUNTING OFFICERS, 1; MAIL SERVICE, 1, 2, 3; TRANSMISSION OF CASES TO COURT OF CLAIMS, 1.

CLAIM-AGENTS.

1. It is competent to the head of a Department, as a measure for the protection of the public interests committed to his charge, to decline to recognize or to suspend the transaction of business with an agent or attorney for frauds and fraudulent practices attempted or committed by him in the prosecution of claims before the Department, and whose character is such that a reasonable degree of confidence cannot be placed in his integrity and honesty in dealing with the Government. 150.
2. The authority to pursue this course, under those circumstances, rests upon the very necessity that exists for its adoption, as a safeguard against fraud, in administering the laws relating to the settlement and payment of claims upon the United States. *Ibid.*
3. Besides, it is a just and necessary limitation upon the right of a party to be represented by an agent, and to select the agent by whom he will be represented, that he shall not employ a person offensive or dangerous to the other party with whom he is to deal. *Ibid.*
4. The head of a Department, however, is not invested with any authority over the professional conduct of claim-agents, for the correction

CLAIM-AGENTS—Continued.

of mere private grievances, corresponding with that possessed by the courts of law over attorneys practicing therein. *Ibid.*

5. Provisions of the 8th section of the act of March 2, 1861, conferring upon the Commissioner of Patents a similar power over the conduct of patent-agents, considered. 151.

CLAIMS AGAINST NEW GRANADA.

1. The claim of R. W. Gibbes against New Granada having been duly referred to the board of commissioners constituted under the convention with New Granada of September 10, 1857, and submitted to an umpire authorized by that convention, who reported his award during the existence of the board, but payment of which was suspended at the Treasury by request of the Secretary of State, and the case afterward referred, without the claimant's consent, to the commission constituted under the convention of February 10, 1864, with the United States of Colombia as the representative of the late republic of New Granada: *Held* that, by the submission of the claim to this commission in the manner stated, the claimant was not divested of his rights against New Granada under the award of the umpire aforesaid. 19.
2. The award not having been vacated, opened, or set aside during the life-time of the former commission or board, and the claimant having done nothing since to waive his rights thereunder, it should be treated by our Government as a valid and conclusive ascertainment of his claim against New Granada. *Ibid.*
3. But under the 7th section of the act of February 20, 1861, chap. 45 the claimant, in order to receive payment at the Treasury of the amount awarded to him, is required to produce a certificate of the board of commissioners in his favor. *Ibid.*

CLAIMS FROM THE INSURRECTIONARY STATES.

1. The act of March 3, 1871, providing for a board of commissioners to receive, examine, and report to Congress, upon claims of loyal citizens of the insurrectionary States for supplies taken or furnished for the use of the Army during the rebellion, repeals the act of July 4, 1864, and the joint resolutions of June 18 and July 28, 1866, so far as Tennessee and the counties of Berkeley and Jefferson, West, Virginia, are concerned, and places that State and those counties upon the same footing in respect to claims as other insurrectionary States. 400.
2. None of these acts, however, are applicable to, or forbid the settlement by the Executive Departments of, accounts founded upon express contracts for the purchase of such supplies, made by officers or agents of the Government acting under competent authority. 401.

See CLAIMS, 6, 7, 8, 15; CONTRACT, 17, 18; MAIL SERVICE, 1, 2.

COLLECTION OF DUTIES.

By a provision in the charter of the Texas Cotton and Woolen Manufacturing Company, which was incorporated by the republic of Texas

COLLECTION OF DUTIES—Continued.

in 1845, that company was exempted from paying duty on all machinery imported for its use and benefit; the legislature of the republic reserving the right to repeal the provision after two years: *Held* that though said provision may remain unrepealed, yet, in the absence of any statute of the United States granting such an exemption, the Secretary of the Treasury cannot permit the importation of machinery by the company without the payment of duties. 262.

COMMISSIONER OF INTERNAL REVENUE.

See INTERNAL REVENUE, 21, 28, 29.

COMPENSATION.

1. An officer who temporarily performs the duties of a vacant office, under the provisions of the act of July 23, 1868, cannot be allowed, for the period during which he discharges this service, any salary other than what is annexed to the office he holds which would involve an increase of compensation. 7.
2. The provision in the 3d section of that act, which declares that "the officer so performing the duties of the office temporarily vacant shall not be entitled to extra compensation therefor," was designed to be general, and applies as well to those vacancies which are supplied by operation of the statute as to those which are filled by designation of the President. *Ibid.*
3. An account of a United States attorney, in California, for professional services not falling within the scope of his official duties, rendered in a matter concerning the title to certain property in that State under the charge and supervision of the Treasury Department, held to be allowable out of the appropriate funds of that Department. 15.
4. Where a volunteer officer in the military service of the United States was sentenced by a court-martial to suspension of rank and pay for a certain period, before the expiration of which he was mustered out of service and discharged: *Held* that the sentence did not work a forfeiture of the three months' extra pay provided by the 4th section of the act of March 3, 1865, chap. 81, but merely deprived the officer, during his continuance in service and while it remained in force, of his regular current pay. 16.
5. To entitle an officer to the extra pay provided in the enactment referred to, it is not necessary that he shall have received an "honorable" discharge; the character of the discharge not being an essential element in the claim. *Ibid.*
6. Statutes relating to the compensation of naval officers and surveyors of customs examined, and the following result reached: 1. That the 9th and 10th sections of the act of May 7, 1822, fix the maximum of compensation to which they are entitled, where it is derived from any or all of the sources comprehended by that act; 2, that the 5th section of the act of March 3, 1841, limits the amount which may be applied to their use where derived from rent and storage received or collected by them, but not from any other source; 3, that they

COMPENSATION—Continued.

- become entitled to compensation out of moneys derived from the last-named source only in cases where the duty of receiving or collecting such moneys is devolved upon them, respectively, by law. 36. (See Note, p. 42; also *infra*, paragraph 14.)
7. Naval officers and surveyors are not entitled to any compensation from the rents and storage received and accounted for by the collectors of the several ports. *Ibid.*
 8. The provisions of the 12th section of the act of March 3, 1863, authorizing the allowance of compensation to attorneys employed to appear in behalf of revenue officers, where such compensation is certified to be reasonable and proper by the court in which the proceeding was had, and is approved by the Secretary of the Treasury, are by the 1st section of the act of July 27, 1863, made applicable to suits or proceedings against any officer or agent of the Government for any act done under color of his office during the rebellion. 42.
 9. An officer in the military service, who, having been arrested for an offense, tried by a court-martial, and convicted, is sentenced to a punishment which necessarily severs his connection with the service, does not forfeit his pay for the period intervening between the date of the arrest and the date when the sentence takes effect, unless forfeiture of pay for such period is expressly made a part of the sentence. 103.
 10. The monthly pay of officers of the Army is prescribed by statute, and so long as a person is an officer of the Army he is entitled to receive the pay belonging to the office, unless he has forfeited it under some provision of law, whether he has actually performed military service or not.
 11. After the passage of the act of June 1, 1860, a purser in the Navy, on duty in a *receiving-ship* at a naval station in California, could only receive the compensation authorized by that act. 169.
 12. Under the laws previously in force, by which the pay of a purser on duty at the *naval station* or *navy-yard* in California must be determined, but one purser could lawfully be attached to that station on general or special duty, or do duty at that navy-yard, so as to be entitled to the pay fixed by those laws for that service, unless he were a purser of the Navy appointed inspector of provisions, clothing, and small-stores at that yard; and a purser doing duty in a *receiving-ship* stationed at or near a navy-yard or station, was not to be regarded as a person on duty at or attached to that navy-yard or station. 170.
 13. Review of the various statutes relating to the subject of compensation of naval paymasters in California. *Ibid.*
 14. Section 8 of the act of July 12, 1870, placing a legislative construction upon the 5th section of the act of March 3, 1841, operates retrospectively, and gives to naval officers and surveyors a greater compensation for past services than the latter section, as expounded by the Supreme Court, gave them when the services were rendered. 297.

COMPENSATION—Continued.

15. The act of 1870, however, does not authorize the re-opening of accounts that have been finally adjusted ; . but where accounts of naval officers and surveyors, for past services rendered since the date of the act of March 3, 1841, are still open, those officers should receive the credits allowed by the act of 1870, and they should receive the same credits in their accounts for future services. *Ibid.*
16. Where a person was appointed an assistant assessor of internal revenue in Texas, and served as such during the years 1865 and 1866, but did not take the oath of office prescribed by the act of July 2, 1862 : *Held* that he is entitled to compensation for the services so rendered, under the provisions of section 11 of the act of July 15, 1870. 306.
17. Section 8 of the act of July 12, 1870, does not repeal the act of March 3, 1851, as regards the compensation of naval officers and surveyors of the ports therein mentioned. That section does not increase the fees of those officers ; it merely permits them to retain the fees as their own up to a greater maximum than before. 312.
18. The compensation approved by the President for the deputy treasurer at the assay office in New York, which is the same in amount as that allowed under existing laws to the treasurer of the branch mint at San Francisco, is allowable under section 10 of the act of March 2, 1853. 335.
19. Where an assistant United States attorney was employed by the Secretary of War, before the passage of the act establishing the Department of Justice, (16 Stat., 162,) to perform certain professional services in connection with the purchase of certain land under the direction of the Department of War : *Held*, 1st. That as the employment was prior to the date of the act, its provisions had no application to the case. 2d. That the services were not such as the United States attorney, or his assistant, was obliged to discharge, and that the Secretary of War was authorized to employ either as special counsel, and allow a compensation therefor. 580.
20. Where, after the said act took effect, counsel were employed by the military authorities to appear in court in certain *habeas-corpus* cases : *Held* that the Secretary of War had no authority to employ such counsel without the consent of the Attorney-General, and that a claim for their services can only be allowed on the approval of the latter. *Ibid.*

See CLAIMS, 13 ; TENURE OF OFFICE ACTS, 2, 11.

COMPROMISE.

See INTERNAL REVENUE, 5, 22, 23, 24, 25 ; POSTAL LAWS, 9.

COMPTROLLER OF THE CURRENCY.

See NATIONAL BANKING ASSOCIATIONS, 5.

CONFEDERATE PROPERTY.

See SECRETARY OF THE TREASURY, 3, 4.

CONSTITUTIONAL LAW.

See APPOINTMENT, 1, 2, 3, 4, 6; ATTACHMENT, 2; FOREIGN MISSION, 2; NATIONAL BANKING ASSOCIATIONS, 1; NATIONAL CEMETERIES, 1; RECONSTRUCTION LAWS, 2; TAX ON OFFICERS' SALARIES, 1; TREATIES, 3.

CONTRACT.

1. In the case of the Amoskeag Company, (which relates to a contract for arms, by the terms whereof the War Department agreed to purchase, at a stated price, all the carbines which the contractor could make in six months, not to exceed six thousand, to be inspected, approved, and delivered, as provided in the agreement,) upon the facts submitted, the United States are not considered legally bound to accept the arms and pay for them, or to pay damages for not accepting them. 46.
2. By the terms of a contract with B., for the transportation of military supplies from Fort Leavenworth to Salt Lake City, it was agreed that in case any of the trains of the contractor were stopped at any time or place *en route* over two days, by any act of the Government, he should be allowed demurrage at a certain rate; and that all orders from officers of the Government to halt trains should be in writing, &c.: *Held* that for the stoppage of a train made by order of an officer of the Government, issued at the request or solicitation of, or in pursuance of an agreement with, a servant of the contractor in charge of the train, the United States would incur no liability under the contract; but that mere acquiescence, without protest, on the part of the servant, in an order given by such officer to stop the train, would not prejudice the rights of the contractor. 92.
3. By an arrangement made between the Secretary of War and the governor of Massachusetts, it was agreed that the expense of transporting certain companies of cavalry, raised and mustered into the United States service in California, from the latter State to Massachusetts, where they were to form part of a Massachusetts regiment and be sent to the field as such, should be paid by Massachusetts; subsequently the men were mustered out of service in Virginia: *Held* that there was no legal obligation on the part of Massachusetts to defray the expense of returning the men to the place of muster. 101.
4. This expense primarily devolved upon the United States, in whose service the troops were employed, and was not assumed by Massachusetts by the agreement referred to. *Ibid.*
5. By the terms of a charter-party, the United States agreed to make compensation to the owner of the chartered boat in case of her injury or destruction "by any event not incident to the navigation of the river or rivers on which she may be employed:" *Held* that the loss of the boat by sinking, in consequence of carelessness on the part of somebody or other, is not a loss by an event "incident to the navigation of the river," within the meaning of that agree-

CONTRACT—Continued.

- ment ; that those words have substantially the same signification as the words "perils of navigation," or "dangers of the seas," or "dangers of navigation." 120.
6. If the boat was lost through the negligence or carelessness of the employés or servants of the owner, the United States are not liable ; but it would be otherwise if the loss occurred solely through the carelessness or negligence of the officers or agents of the Government. *Ibid.*
7. B., the owner of land, leased it to H., with the privilege of purchasing an interest therein at a certain price during the term, and also with the privilege of letting it to the Government for a reasonable time beyond the term ; the lease contained a provision that if the lessee should not elect to purchase during the term, his contract with the Government, in case the land were let thereto, should be transferred to the lessor ; the land was let to the Government for such period as it might be required thereby ; and the term of the original lease having subsequently expired, and it being a disputed fact whether the lessee had elected to purchase within the term or not : *Advised* that if a new lease of the premises is desired by the Government, it should be entered into with B. and not with H., but that the rent due under the existing contract between the Government and the latter, which has accrued since the expiration of the original lease, cannot, under the circumstances, safely be paid to the former. 124.
8. In August, 1864, the Postmaster-General, after previous advertisement for proposals, made a contract with one N. for furnishing the Government with stamped envelopes and newspaper wrappers, the term of which extended from September 12 to December 31, 1864 ; the advertisement did not provide for any extension of the contract beyond that term, but the contract contained a provision that it might be extended or modified by mutual agreement ; the contract was subsequently modified and extended to April 1, 1866, again to April 1, 1867, again to April 1, 1868, and finally to April 1, 1871 : *Held*, 1st, that section 17 of the act of August 26, 1842, (chap. 202,) applied to the contract ; 2d, that the provision in the contract for its extension was unauthorized by law ; and 3d, that the Postmaster-General may terminate the contract, on reasonable notice to the contractor, without reference to any failure on the part of the latter to perform it. 174.
9. Any extension of such a contract, unless for a period fixed as an alternative in the proposals, is unwarranted. *Ibid.*
10. The provisions of the acts of 1851, (chap. 20, sec. 3,) and 1852, (chap. 113, sec. 88,) imposing certain duties on the Postmaster-General relative to furnishing stamped envelopes, do not interfere with the general provision contained in the act of 1842, regulating the manner in which he shall provide such articles, viz., by advertisement for proposals, and contract made in pursuance thereof. *Ibid.*
11. The facts stated in the case submitted showing that a certain sum was

CONTRACT—Continued.

- due to a mail-contractor under this contract, which, by mistake and misapprehension, the Department has paid to another : Advised that the contractor, notwithstanding such payment, is entitled to the money due under his contract, and accordingly that, if there is any fund in the hands of the Postmaster-General available for the purpose, the latter should pay it. 226.
12. If, however, the case, upon the same state of facts, has already been considered and finally decided by any of that officer's predecessors, it would fall within the principle that the final decision of a case before a head of Department is binding upon his successors in the same Department. *Ibid.*
13. *Sembler* that the clause in mail contracts authorizing a discontinuance of the service by the Postmaster-General on payment of one month's extra pay is inapplicable to a case where, without any interference of the Postmaster-General or any order on his part, the further execution of the contract has become impossible or illegal. 259.
14. Accordingly, the issue of an order by the Postmaster-General in May, 1861, under the act of February 28, 1861, suspending postal service in certain States then in insurrection, could not entitle a contractor for carrying the mail in one of those States to a month's extra pay in virtue of such clause in his contract. *Ibid.*
15. No person can make a valid contract in behalf of the United States unless expressly or impliedly authorized by statute so to do ; but, if so authorized, the right to make such contract is not necessarily limited to contracts with persons who are not enemies of the United States. 314.
16. Whether the right to make the contract is a right to make it with an enemy, depends upon the true construction of the statutes authorizing the making of the contract, and not upon any general principles of public law. *Ibid.*
17. An express contract made in behalf of the United States, during the rebellion, with a citizen and resident of an insurrectionary State, for quartermaster's supplies, if the officer making it acted under competent authority, is valid. *Ibid.*
18. The settlement of a claim arising under such a contract is not barred by the acts of July 4, 1864, and February 21, 1867. *Ibid.*
19. Review of the statutes relative to the making of contracts in behalf of the United States for quartermaster's stores down to and including the act of July 4, 1864, (13 Stat., 394;) from which it appears that, under the law as it stood after the passage of that act, Congress has not authorized purchases or contracts for such stores to be made except in the following manner :
1. By or under the direction of the chief officer of the Department of War, (act of July 16, 1798.)
 2. By the officers of the Quartermaster's Department, under the direction of the Secretary of War, (acts of March 28, 1812, and August 23, 1842,) or under the direction of the Quartermaster-

CONTRACT—Continued.

General, or, in cases of emergency, by the chief quartermaster of an army or detachment under the order of the commanding officer, (act of July 4, 1864.)

3. All contracts to be made after previous advertisement for proposals respecting the same, except in cases of emergency, (act of July 4, 1864.) 315.

20. Where the crew of an American ship had been shipped by the master in the United States, and the shipping articles contained a clause that "all moneys were to be paid in United States currency or its equivalent in gold at the current rate of exchange:" *Held* that, in settling some accounts with the master, at Singapore, India, for the wages of his crew, the United States consul there should have allowed a deduction from the pay of the seamen of the difference between "greenbacks" and gold or silver, the currency of Singapore, and the cost of exchange thereon between India and America. 557.
21. Though the law is liberal in construing contracts in favor of seamen, still it holds them capable of contracting, and bound like other persons by their contracts when no fraud is practiced upon them. *Ibid.*

COURT-MARTIAL.

1. Where, at the organization of a naval court-martial, each member of the court was first sworn by the judge-advocate, who was then sworn by the president of the court, instead of the oath being first administered by the president to the judge-advocate, and then by the latter to each member of the court, as prescribed by the act of July 17, 1862: *Held* that, notwithstanding the irregularity in the order of administering the oaths, the proceedings of the court must now be held valid. 374.
2. Where a soldier was tried by a court-martial for theft and desertion, and, having been convicted of both charges, was sentenced by the court; but the proceedings, findings, and sentence were afterward disapproved by the reviewing officer, (the commanding general of the military department,) and the prisoner ordered to be released from confinement and restored to duty: *Held* that the action of the reviewing officer was in effect an acquittal by the court; that the accused is, in contemplation of law, innocent of the charges mentioned; and that there is no authority for withholding his pay on account of the alleged desertion. 459.
3. One T. was apprehended in April, 1871, on the charge of having deserted from the Army in October, 1865, and was detained for trial by a court-martial for that offense. He had enlisted in August, 1865, for the term of three years; from the time of the alleged desertion to the time of the arrest more than five years had expired, and from the expiration of the term of enlistment to the arrest more than two years: *Advised* that the court-martial has no jurisdiction to try the case, because of the bar presented by the 88th article of war. 462.

COURT-MARTIAL—Continued.

4. According to the law regulating courts-martial, the judge-advocate is the official prosecutor; and, in cases arising in the Navy, he is by custom either a naval officer, especially designated, or a lawyer employed for that purpose. 514.
5. But, by force of section 17 of the act of June 22, 1870, establishing the Department of Justice, where the case before the court-martial is of such a character as to render it expedient that the proceeding be conducted by a lawyer, the Secretary of the Navy is not at liberty to employ counsel, but should call upon the Department of Justice to supply an officer for the service. *Ibid.*

See **COMPENSATION**, 4, 9; **INDIANS**, 4, 5; **MILITARY COMMISSION**.

COURT OF CLAIMS.

Under the proviso to the 11th section of the act of February 24, 1855, the head of a Department is not at liberty to furnish to the Court of Claims, on a call from that court, information or papers, when to do so would, in his opinion, be injurious to the public interest. 539.

See **TRANSMISSION OF CASES TO COURT OF CLAIMS**, 1, 2, 3, 4.

CUSTOMS LAWS.

See **COLLECTION OF DUTIES**; **COMPENSATION**, 6, 7, 14, 15, 17; **OFFICERS OF CUSTOMS**, 1, 2, 3; **SECRETARY OF THE TREASURY**, 1, 2; **STORAGE**, 1, 2, 3, 4.

DAKOTA.

1. By force of the provisions of the act of March 3, 1869, prescribing the terms of members of territorial legislatures, and regulating the sessions of such legislatures, the election of members of the legislature of Dakota Territory, held in October, 1870 was invalid. 343.
2. The legislature of that Territory, chosen in October, 1869, is the lawful legislature for the space of two years from the commencement of its term. *Ibid.*
3. The special session of the legislature of Dakota, called by the acting governor of the Territory to meet April 18, 1871—a regular session having met in the latter part of the year 1870—held to be unauthorized by law; the act of March 3, 1869, providing that the sessions shall be biennial, and containing no exception for the case of a special session. 408.

DAMAGES BY OPERATIONS OF WAR.

See **CLAIMS**, 2, 3.

DELIVERY OF LETTERS.

See **POST-OFFICE**, 1, 2, 3, 4, 5.

DEPARTMENT OF JUSTICE.

See **COURT-MARTIAL**, 5; **PRESIDENT**, 4.

DESERTER.

See **BOUNTY**, 1, 2, 3, 4, 5; **COURT-MARTIAL**, 2, 3; **LIMITATION**.

DISCHARGE FROM THE ARMY.

See ARMY, 4, 5, 15, 17, 18, 22.

DISMISSAL OF MILITARY OFFICERS.

1. Where a captain in the Marine Corps, in whose favor an examining board convened by the Secretary of the Navy under the 17th section of the act of August 3, 1861, had made a favorable report, but who was, notwithstanding such report, subsequently (in December, 1864) dismissed from the service by a general order of the Navy Department: *Held* that the officer was lawfully removed from the service. 3.
2. At that period, by virtue of the 17th section of the act of July 17, 1862, the President was fully invested with a statutory power of summary dismissal respecting officers in the Army, Navy, and Marine Corps, which it was competent to him to exercise at discretion. *Ibid.*
3. The order of dismissal promulgated by the Secretary of the Navy, though containing no express reference to the direction of the President, was nevertheless sufficient. *Ibid.*

DISTRICT ATTORNEYS.

See COMPENSATION, 3.

DISTRICT OF COLUMBIA.

1. The board of police of the District of Columbia have no authority to employ, in the erection of buildings to be used as police headquarters, the funds saved from past appropriations made by Congress for the payment of salaries and other necessary expenses of the metropolitan police for said District. 264.
2. The appointment of the register of wills for the District of Columbia is with the President, by and with the advice and consent of the Senate, and the tenure of the office is at the pleasure of the President, subject to the modification prescribed by the tenure-of-office acts. 409.
3. Where the engineer in charge, being required by law to invite proposals by circulars and advertisement for furnishing pipes for a water-main from the Washington Aqueduct in the District of Columbia, and to give the contract to the lowest responsible bidder, issued instructions stating that "no bid will be considered which does not comply with" certain directions, and the lowest bid afterward received failed to comply with those directions in material points: *Held* that the bid cannot be considered. 510.
4. When the law under which the engineer acts authorizes him to solicit bids by circular, &c., and then requires the contract to be given to the lowest responsible bidder, it must be construed to mean that the lowest responsible bidder who conforms to the terms prescribed in the circular shall have the contract. *Ibid.*
5. The act of Congress of February 21, 1871, providing a government for the District of Columbia, does not repeal or modify the act of

DISTRICT OF COLUMBIA—Continued.

- March 3, 1803, providing for the organization of the militia of the District; nor does it confer upon the legislative assembly of the District power to repeal or modify the provisions of the latter act. 541.
6. Congress not having placed the Secretary of War under the direction of the said legislative assembly, it has exceeded its powers in enacting that "the officers of the District militia shall be commissioned by the Secretary of War." 542.
 7. Under the act of February 21, 1871, it is the duty of the governor of the District to commission all officers created by the District legislative assembly. *Ibid.*
 8. The board of health of the District of Columbia, in the absence of any statutory provision on the subject, has of necessity an inherent power to appoint officers necessary to its complete organization, such as a clerk or secretary. 577.
 9. The board may not only declare what shall be deemed nuisances, but provide by contract or otherwise for the removal of nuisances, if necessary, at the expense of the District. *Ibid.*
 10. *Sembler* that the power given to the board to make and enforce regulations is confined to preventing domestic animals running at large in the streets, and the sale of unwholesome food; but that this power includes the power to fix penalties for the violation of such regulations, at least in the absence of any legislation on the subject. *Ibid.*
 11. The enforcement of such penalties, however, must be through the ordinary tribunals and magistracy of the District. *Ibid.*

EIGHT-HOUR LAW.

1. The act of June 25, 1868, known as the eight-hour law, has nothing to do with the compensation to be paid to workmen in the navy-yards, that being still left to be determined under the provisions of the act of July 16, 1862, so as to conform, as nearly as is consistent with the public interest, with the rate of wages of private establishments in the immediate vicinity of the respective yards. 29.
2. There is nothing in the latter statute requiring workmen in the navy-yards to be paid the same price for eight hours' labor which private establishments pay for ten or twelve, unless the amount of services rendered or the quality of the work make the fewer hours in the navy-yards equivalent in value to the longer time hired in private establishments, or for some other reason make it consistent with the public interest. *Ibid.*
3. The conclusions of Attorney-General Evarts, in his opinion of November 25, 1868, (12 Opns., 520,) referred to and approved. *Ibid.*
4. The act of June 25, 1868, declaring that "eight hours shall constitute a day's work," left the subject of compensation to be regulated upon principles in force at the time of its passage. The President by proclamation dated May 19, 1869, directed that thereafter no reduction should be made in the wages of Government employés on account of the reduction in the hours of labor: *Held* that persons

EIGHT-HOUR LAW—Continued.

serving the Government as laborers, workmen, and mechanics are not entitled to receive, for the period intervening between the date of the act and the date of the proclamation, the wages of a day of ten hours for working eight hours—the Government being under no obligation to pay more for the past because it has agreed to pay more for the future. 424.

ELIGIBILITY TO OFFICE.

1. General E. S. Parker (an Indian) not considered disqualified from holding the office of chief of a Bureau, under the Constitution and laws of the United States. 27.

EVIDENCE.

1. The Secretary of the Interior is not concluded in his action as to the issue of certain land scrip by what purports to be an authenticated copy of an act of the State of Florida of the 19th of February, 1870, but may inquire whether or not such an act was passed by the legislature of the State and has become a law. 224.
2. A paper purporting to be a duly authenticated copy, or an exemplification, of a statute of a State under the seal of a State, is *prima facie* evidence of the existence of such statute; and, in the absence of anything to the contrary, would justify the Secretary in acting upon it. *Ibid.*
3. But when evidence is exhibited or suggestions made that there is no such statute, or that it was not passed according to the forms of law, he has a right, and it is his duty, so far as he is called upon to act in reference to the existence or validity of such a statute, to inquire and determine what the facts in those respects are. *Ibid.*

See INTERNATIONAL LAW, 2; NEUTRALITY ACT, 3.

EXAMINATION OF TITLES.

Such peculiar service as the examination of a title to land is not within the spirit, or, necessarily, the letter of section 17 of the act of June 22, 1870, (16 Stat., 164;) and it is competent to the head of a Department, in his discretion, to employ a conveyancer, or an attorney, to examine titles, notwithstanding the provision of that act. 580.

FISHING BOUNTIES.

Where a fishing-smack, having complied with all the conditions required by the law relating to fishing bounties except the return to port, was captured on its way home by a confederate privateer and destroyed: *Held* that the capture and destruction constituted a loss of the vessel within the meaning of the act of May 26, 1824, and that the owner and crew are accordingly entitled, under the provisions of that act, to the same bounty they would have been allowed had the smack returned to port. 423.

FOREIGN MISSION.

1. *Sembler* that, in the case of a foreign mission, the holder of the office is not displaced by the appointment of a successor until the latter enters upon his duties. 300.
2. A minister plenipotentiary from the United States to a foreign power cannot, without the consent of Congress, accept a similar commission from a third power; though he is not prohibited from rendering a friendly service to a foreign government, even that of negotiating a treaty, provided he does not become an officer thereof. 537.
See TENURE OF OFFICE ACTS, 6.

FORFEITURE.

1. There is no regulation, or statute, or principle of law, which renders forfeitable to the United States moneys belonging to soldiers found in their possession at the time of enlistment, and taken from them under a general order issued as a military police measure. 210.
2. Such moneys, taken from enlisted men who are entered on the muster-rolls as deserters, but have never been convicted of desertion, are not payable to the board of managers of the National Asylum for Disabled Volunteer Soldiers, as moneys forfeited on account of desertion. *Ibid.*
3. By enlisting or drafting a soldier, the United States acquire no right over his property not accruing to him in consideration of his enlistment or military service, and cannot rightfully deprive him of it permanently, except as a punishment for crime. *Ibid.*
4. The right to take money or other property from his possession while in the service which would be likely to interfere with the requirements of discipline, is entirely different in principle from the right wholly to divest him of it. *Ibid.*

See ADMINISTRATIVE LAW, 4; BOUNTY, 1, 2, 3, 4, 5; COMPENSATION, 4, 9.

FRANKING PRIVILEGE.

1. The Postmaster-General may, by regulation, authorize officers in or belonging to the various Executive Departments, legally designable as chief clerks, whether of the Departments proper or of Bureaus therein, to frank official communications. 2. (See Note, p. 3.)
2. The franking privilege is a personal privilege, and the selection of the person to whom matter shall be sent free through the mails cannot be delegated by the person enjoying the privilege to any other person. 157. (See Note, p. 3.)

FREEDMEN'S BUREAU.

The Freedmen's Bureau cannot be regarded as an agent or attorney within the meaning of the joint resolution of July 26, 1866, fixing the fees for collecting bounty-claims of colored soldiers, &c., in cases where such claims are collected by it, and, therefore, cannot retain for the Government the prescribed fees for such service, though the claimants so request. 509.

FUNERAL EXPENSES OF NAVAL OFFICERS.

See NAVY, 5, 6.

FUR-SEALS.

See ALASKA, 1, 2.

GRANT OF LANDS TO THE UNITED STATES.

1. The reservation in the deed of Simeon Leland and wife, conveying David's Island, in Long Island Sound, to the United States, of "the right of ferriage to and from said premises," secures to the grantors a right to use so much of the island as may be needed for the purpose of a ferry, whether public or private, and for no other purpose. 425.
2. The Government, however, is under no obligation to use a ferry kept by the grantors, but may, simply as a riparian proprietor, establish one for its own accommodation. *Ibid.*
3. It may also allow others than the grantors to land boats at the island, and to transport thereto and therefrom passengers or freight, and may avail itself of the facilities for communication thus afforded. 426.
4. Parties having proposed to donate to the United States certain land for the extension of the pier and breakwater at Oswego, New York, upon the following conditions, viz., that the work "shall be constructed at or near the point, and substantially upon the plan adopted and recommended by the board of engineers," &c. : Advised that, if the latter condition is omitted, the donation may properly be accepted, even though the former condition is retained, but not otherwise. 465.

HABEAS CORPUS.

An officer of the Army, in Kansas, having arrested three men at the request of the United States marshal, charged with assaulting the latter and obstructing the execution of process by him, while the parties so arrested were in the officer's custody a writ of *habeas corpus* was issued by the probate judge of the county, commanding the officer to bring before him the bodies of the prisoners together with the cause of their detention ; the officer made a proper return to the writ, but without bringing up the prisoners, whom he turned over to the marshal ; whereupon the judge issued an attachment against the officer: Held (on the assumption that the marshal made the arrest under proper process or warrant of a United States court or commissioner, or for an offense committed within his own view, and that the officer was duly summoned by the marshal to assist in making the arrest and holding the prisoners) that it was the duty of the officer to obey the writ of *habeas corpus* no further than to make a respectful return of the facts of the case, showing that he held the prisoners under authority of the United States, and that the attachment was void and need not have been obeyed. 451. (See also Note, p. 455.)

ILLINOIS TWO PER CENT. FUND.

See **ACCOUNTS AND ACCOUNTING OFFICERS**, 5.

INDIANA CLAIMS.

See **ACCOUNTS AND ACCOUNTING OFFICERS**, 4.

INDIANS.

1. The act of March 3, 1865, withdrew from the Secretary of the Treasury the authority given him by the act of March 2, 1861, to issue to the Choctaw tribe of Indians bonds of the United States to the amount of \$250,000. 354.
2. But that authority was revived by the treaty with said tribe of April 28, 1866, under which the Secretary may lawfully issue the bonds to the Choctaws, as provided in the above-mentioned act of March 2, 1861. *Ibid.*
3. By the 7th section of the act of February 27, 1851, all laws then in force concerning trade with the Indians were extended to New Mexico; and parties arrested or property seized there, by the military authorities, for violation of those laws, should be placed in the custody of the marshal of the Territory, to be proceeded against according to law. 470.
4. If the parties arrested were engaged in supplying ammunition to Indians in open and notorious hostility to the United States, who properly came within the description of public enemies, in that case they would seem to be amenable to trial and punishment by court-martial under the 56th article of war. *Ibid.*
5. When any Indian tribes are carrying on a system of attacks upon the property or persons, or both, of the settlers upon our frontiers, or of the travelers across our Territories, and the troops of the United States are engaged in repelling such attacks, this is war in such a sense as will justify the enforcement of the articles of war against persons who are found relieving the enemy with ammunition, &c. *Ibid.*

See **BOND**; **ELIGIBILITY TO OFFICE**; **INTERNAL REVENUE**, 26; **TREATIES**, 1, 2, 4, 5.

INDIAN TERRITORY.

As between the Missouri, Kansas and Texas Railroad Company and the Missouri River, Fort Scott and Gulf Railroad Company, the right, under the acts of Congress and the treaties with the Indians, to construct a railroad through the Indian Territory, from the southern boundary of Kansas, belongs to the former company. 285.

See **INTERNAL REVENUE**, 26.

INFORMERS AND INFORMERS' SHARES.

See **INTERNAL REVENUE**, 4, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19.

INTERIOR DEPARTMENT.

See **BOND**.

INTERNAL REVENUE.

1. The city of Baltimore, by authority of the State legislature, made a loan to the Baltimore and Ohio Railroad Company, the latter agreeing to pay to the city interest thereon quarter-yearly, at the rate of 6 per cent. per annum, and giving to the city a mortgage upon all its property, to secure the performance of the agreement: *Held* that the company is not liable, under the provisions of the internal revenue act of June 30, 1864, as amended by the acts of July 13, 1866, and March 2, 1867, to pay a tax upon the interest payable by it to the city on the said loan. 67.
2. The opinions of Mr. Stanbery and Mr. Browning, touching kindred subjects which were submitted to and considered by them, (see 12 Opns., 176, 277, 376,) reviewed. *Ibid.*
3. The provisions of the internal-revenue laws relating to income taxation do not apply to municipal corporations, either directly, by imposing a duty upon their receipts of revenue, or indirectly, by imposing a duty upon the sources whence their revenue is derived. *Ibid.* (See also Note, p. 76.)
4. Money recovered in a suit on an export bond given under the internal-revenue laws belong exclusively to the United States, the same as money recovered in a suit on any other contract with the Government; and neither revenue officers nor informers can have any share therein. 115.
5. An export bond covering certain distilled spirits was subsequently canceled upon the production of a landing certificate; after which it turned out, on examination at the place of landing, that the barrels which contained the spirits were all, or nearly all, filled with water, in fraud of the revenue: *Advised* that a claim which has since been preferred against the obligors in the bond, with respect to their liability in the matter, (no suit or proceeding in court having been commenced,) might be compromised, by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. 116.
6. The provisions of the 97th section of the internal-revenue act of June 30, 1864, relative to the discharge of duties upon articles delivered to the United States under contract, where such duties were imposed subsequent to the date of the contract, are limited to additional duties on the articles contracted to be delivered, and do not include additional duties imposed upon articles used in the manufacture of the articles so contracted to be delivered. 138.
7. Accordingly, a person who contracted before the passage of the act of June 30, 1864, to furnish army clothing to the Government after its passage, is discharged from payment of the two per cent. additional tax imposed by that act upon clothing, but not from payment of any additional taxes imposed upon the yarn or cloth used in its manufacture. *Ibid.*
8. The proviso to the 97th section of the internal-revenue act of June 30, 1864, is applicable only to such persons as, by reason of manufacturing the articles taxed, either by themselves or their agents, would have been liable to pay the additional taxes upon the articles unless exempted therefrom by the provisions of that section. 143.

INTERNAL REVENUE—Continued.

9. Internal-revenue officers are not excluded from claiming and receiving informers' shares. 228.
10. The provisions of the 179th section of the act of June 30, 1864, as amended by the act of July 13, 1866, relating to such shares, are expressly applicable only to cases not otherwise provided for; but where it is not otherwise provided for, they are applicable, whether the fine, penalty, or forfeiture is recovered or is recoverable by indictment, or information, or action of debt. *Ibid.*
11. The form of the prosecution is immaterial in respect to the rights of any person claiming as informer; and under the statutes now (May, 1870) in force, the fact that a fine or penalty can be recovered only by indictment is no objection to the claim of any person to be declared informer. *Ibid.*
12. The statute does not state to whom the first information must be given in order to entitle the person giving it to be declared informer; but the intention is that it should be given to the United States; that is, to some person representing the United States for the purpose of administering the internal-revenue laws. *Ibid.*
13. A communication, however, from one revenue officer to another, or from a revenue officer to a United States attorney, or *vice versa*, is not *first informing* within the meaning of the statute. *Ibid.*
14. Internal-revenue officers, who by law are authorized to enter and inspect buildings and places used for certain purposes, may become entitled to share as informers, if in the performance of such service they first discover the cause, matter, or thing whereby a fine, penalty, or forfeiture has been incurred. 229.
15. Whether a subordinate officer, acting under the instructions of his official superior, is in such case to be regarded as an informer in consequence of what he discovers while so acting, depends upon how far his discoveries were the result of his own exertion and skill, and how far they were the result of the instructions given him. *Ibid.*
16. The right of an internal-revenue officer to be declared an informer in any case does not depend upon the particular office he holds, but upon what he himself has discovered and done to insure the recovery of any fine, penalty, or forfeiture, or the payment of moneys in lieu thereof. *Ibid.*
17. Detectives whom the Commissioner of Internal Revenue is authorized to employ by the 50th section of the act of July 20, 1868, are not internal-revenue officers. *Ibid.*
18. An internal-revenue officer who has obtained information of a violation of the internal-revenue laws in the manner authorized thereby, may be awarded an informer's share of the proceeds of the fine or forfeiture. 369.
19. Detectives employed in the internal-revenue service under section 50 of the act of July 20, 1868, may be allowed informers' shares. *Ibid.*
20. Internal-revenue tax paid on dividends accruing to the State of

INTERNAL REVENUE—Continued.

- Massachusetts as a stockholder in the Boston and Albany Railroad, from January, 1863, to July, 1869, inclusive: *Held* (upon the authority of opinions of former Attorneys-General cited) to have been erroneously collected. 439.
21. The Commissioner of Internal Revenue is authorized, not obliged, to refund taxes erroneously collected; but he should refund in all such cases, except where the fault of the tax-payer, or his waiver of his rights, or his long acquiescence, or other sufficient circumstances, discredit the claim. *Ibid.*
22. Under section 102 of the act of July 20, 1868, the Commissioner of Internal Revenue has power to compromise cases arising under the internal-revenue laws, before suit, with the advice of the Secretary of the Treasury; but after the commencement of a suit or proceeding in court, the recommendation of the Attorney-General is also necessary. 479.
23. The power to compromise, under that section, ceases as soon as a judgment in the suit or proceeding is rendered. *Ibid.*
24. But by virtue of authority conferred by section 10 of the act of March 3, 1863, judgments obtained by the United States in civil proceedings instituted under the internal-revenue laws may be compromised by the Secretary of the Treasury, upon the report and recommendation of the attorney or agent of the Government and of the Solicitor of the Treasury. *Ibid.*
25. The provision in section 179 of the act of June 30, 1864, as amended by the act of July 13, 1866, for compromising internal-revenue cases, is repealed by section 102 of the act of July 20, 1868. 525.
26. Property belonging to an Indian may be seized in the Indian Territory for a violation of the internal-revenue laws. 546.
27. The proprietors of coasting vessels, and vessels running upon the rivers and inland lakes, engaged in the carrying or delivery of money, valuable papers, or any articles for pay, whose gross receipts therefrom exceed one thousand dollars per annum, are liable to the special tax imposed on express carriers and agents by paragraph 50 of section 79 of the act of June 30, 1864, as amended by the act of July 13, 1866. 572.
28. The Commissioner of Internal Revenue has no authority to direct the restamping of distilled spirits and fermented liquors where the stamp previously affixed has become detached and destroyed without the fault of the distiller. 574.
29. *Sembler*, however, that where the distiller, in consequence of the destruction of the stamp, is forced to affix a new one, the Commissioner, upon proof of these facts, may direct the price of the second stamp, or, rather, the tax thus a second time exacted, to be refunded, under the power given him to refund taxes illegally assessed. *Ibid.*
30. The provisions of section 67 of the act of July 13, 1866, (14 Stat., 171,) .

INTERNAL REVENUE—Continued.

for the removal of suits against internal-revenue officers, have no application to suits brought against such officers in the Territories. 584.

See CITIZENSHIP, 3; TAX ON OFFICERS' SALARIES, 2, 3.

INTERNATIONAL LAW.

1. A citizen of the North German confederation, who becomes a naturalized citizen of the United States, must have an uninterrupted residence of five years in the United States before he is entitled to the immunities guaranteed by the treaty with that confederation of February 22, 1868. 376.
2. The recital contained in the record of the naturalization proceedings, that he had resided continuously in this country for more than five years, is not conclusive as to the fact so recited. *Ibid.*
3. The rule that, before a citizen of one country is entitled to the aid of his government in obtaining redress for wrongs done him by another government, he must have sought redress in vain through the judicial tribunals of that other government, is inapplicable where the offending government, by the acts of its proper organ, relieves the injured party from the obligation of pursuing such a course. 541.
4. The government of Brazil is not responsible for damage resulting to a citizen of the United States from the alleged corruption of a municipal judge in that country, in authenticating and ratifying the report of a board of surveyors upon a damaged vessel, though the charge were established. 553.
5. Where an officer with a party of armed men, acting under an order of a judicial officer of the port of Granada, seized an American vessel at that port, kept possession of it a few hours, and then withdrew pursuant to an order of the same judge, the seizure having been made for the purpose of enforcing a supposed legal right: Advised that this Government ought not to make reclamation in behalf of the owner, as it is presumable that, if the proceedings were illegal, the judicial tribunals of Nicaragua will afford redress. 554.

See CITIZENSHIP, 2; NEUTRALITY ACT, 1.

INTERPRETATION OF STATUTES.

1. A statute of the United States should not be so interpreted as to require the aid or action of the officers of a State for its administration, unless its language is plain that the State officers were intended to be employed in administering it. 244.
2. The presumption is that the officers mentioned in a United States statute, who are to carry out its provisions, are officers of the United States, if there are any officers of the United States such as are described in the statute. *Ibid.*
3. Provisions of the act of July 1, 1870, for the improvement of water communication between the Mississippi River and Lake Michigan, construed in reference to the duties of the arbitrators authorized to be appointed thereunder. 333.

JURISDICTION OVER LANDS ACQUIRED IN STATES.

1. The purchase by the United States of the land occupied by Fort Trumbull, Connecticut, and the consent of the State legislature to the purchase, though a formal cession of jurisdiction is wanting, give to Congress the exclusive power of legislation over the purchased land. 411.
2. The act of the Virginia legislature of January 14, 1871, providing for a cession of jurisdiction over the bridge across Mill Creek, at Old Point Comfort, Virginia, owned by the Government, proposes in effect that the United States shall have exclusive jurisdiction over the bridge and its abutment (with concurrent jurisdiction in the State for the execution of process) so long as the bridge is kept up and maintained by the Government for military purposes, and the public are permitted to pass over the same free of charge, and no longer: *Advised* that there would be no impropriety in accepting the grant of jurisdiction executed by the governor of the State in pursuance of said act, upon the terms proposed. 418.
3. The act of the legislature of New Jersey, mentioned in the case submitted, considered insufficient to meet the requirements of the law of September 11, 1841, in regard to the cession of jurisdiction over certain land purchased by the United States at Finn's Point, in that State. 460.
4. Such cession may take place in two ways: indirectly, by the State consenting to the *purchase* of the land by the United States; and directly, by the State granting the jurisdiction to the United States. *Ibid.*

See **NATIONAL CEMETERIES**, 1, 3.

JUDGE-ADVOCATE.

See **ARMY**, 11, 12; **COURT-MARTIAL**, 4, 5.

LAND-GRANT ROADS.

1. The railroad between the towns of McGregor and Colmar, in Iowa, formerly owned by the McGregor Western Railroad Company, and now forming a part of the line of the Milwaukee and Saint Paul Railway Company, is not a "land-grant" road. 445.
2. By the 7th section of the act of September 20, 1850, granting public lands in aid of the construction of a railroad from Chicago to Mobile, such railroad became a public highway for the purposes mentioned in said section for its whole length, and not merely for that part of the road along which the granted lands were located. 536.

LANDS, PUBLIC.

1. The New Idria Mining Company, if entitled to a patent under the law, and are prepared to furnish the proper proof of it, have a right to have the question of their claim to such patent passed upon by the Interior Department, notwithstanding the request from a committee of one of the Houses of Congress for suspension of action. 113.

LANDS, PUBLIC—Continued.

2. Alternate sections of public lands, though unsurveyed, which fall within the operation of the act of March 3, 1863, entitled "An act for a grant of lands to the State of Kansas, in alternate sections, to aid in the construction of certain railroads and telegraphs in said State," may be withdrawn from pre-emption, homestead, and other disposal, along the lines of the railroads thus aided, where the same are located through such unsurveyed lands. 378.
3. The pendency before the proper tribunals of a private land-claim in California, under the act of March 3, 1851, brings the land covered by the claim within the meaning of the term "reserved" in section 3 of the act of July 1, 1862, though the claim is ultimately decided to be invalid; and consequently such land is excepted from the grant contained in the latter act. 387.
4. Where a patent for public land has once issued, it cannot afterward be canceled or annulled by the mere act of the Department; the intervention of a court is necessary for that purpose. 456.
5. A second patent should not issue for the same land so long as the prior patent remains unrevoked by a judicial tribunal. *Ibid.*

See **OREGON CENTRAL RAILROAD COMPANY.**

LEGAL-TENDER NOTES.

The annual installments of interest due to the United States under the convention with Spain of February 17, 1834, may, by virtue of the legal-tender act of February 25, 1862, be paid in Treasury notes, if the Spanish government chooses to offer them in payment, there being no express provision in the convention that the money shall be paid in coin. 85.

LIMITATION.

The last clause of section 12 of the act of January 29, 1813, was not intended to repeal the 88th article of war, so far as the offense of desertion is concerned, and thus allow a deserter to be tried at any time after the term of his enlistment, notwithstanding two years may have elapsed since the commission of the offense; the limitation imposed by that article still applies. 462.

See **COURT-MARTIAL, 3.**

MAIL CONTRACTS AND CONTRACTORS.

See **CONTRACT, 11, 13, 14; OATH OF OFFICE, 2, 3; POSTAL LAWS, 2, 3, 4, 5, 6, 7, 10.**

MAIL SERVICE.

1. The joint resolution of March 2, 1867, prohibiting the payment of claims in favor of parties who promoted, encouraged, or sustained the rebellion, &c., which accrued prior to the 13th of April, 1861, does not apply to claims in favor of corporations aggregate. 398.
2. Hence the claim of a railroad corporation in one of the Southern States, for transportation of the mails from April 1 to May 31, 1861, is not in any part within the prohibition. *Ibid.*

MAIL SERVICE—Continued.

3. But unless there remains an unexpected balance not covered into the Treasury, sufficient in amount for the purpose, of moneys appropriated for the postal service for the fiscal year 1860-'61, it would seem that payment of such claim cannot now be made without a special appropriation therefor. *Ibid.*

See **CONTRACT**, 11, 13, 14.

MARINE CORPS.

See **DISMISSAL OF MILITARY OFFICERS**, 1.

MARINE HOSPITAL TAX.

1. The new rate of taxation upon vessels, for the marine hospital, provided by the 1st and 2d sections of the act of June 29, 1870, was intended to be laid uniformly from and after August 1, 1870. Accordingly, such rate first accrued on any vessel on the 2d of August, 1870; up to which date the former tax of 10 cents per month is still collectible. 330.
2. Canal-boats are not liable to the tax imposed by that act. *Ibid.*

MILITARY ACADEMY.

In general, minors whose fathers are living and residing within the United States are, by reason of their minority, ineligible to appointment as cadets to the Military Academy at West Point from any other congressional districts than those in which their fathers reside. 130.

MILITARY BOOTY.

During the rebellion certain barges were impressed into the military service of the insurgent States, and continued in that service until their capture by the Army of the United States, after which they were retained for the use of the Quartermaster's Department: Advised that the barges are military booty, and belong wholly to the United States; that the War Department has the same right to dispose of them as of other property of the United States in its possession of a similar kind. 105.

MILITARY COMMISSION.

See **RECONSTRUCTION LAWS**, 1.

MILITARY RESERVATION.

1. The Secretary of War has authority, under the resolution of Congress of May 4, 1870, to carry out the agreement entered into by him respecting the military reservation at Fort Snelling, Minnesota, by making conveyances and accepting releases as provided in that agreement. 345.
2. In view of the circumstances appearing in the case submitted, it is recommended that the claim of the Roman Catholic Mission of St. James to certain land at or near Fort Vancouver, Washington Territory, used by the United States for military purposes, be resisted, and possession of the premises be retained by the Government, until the mission shall have established its title by the judgment of a competent court of law. 467.

MILITIA.

See **DISTRICT OF COLUMBIA**, 5, 6, 7.

MONEY RECEIVED FROM RECRUITS.

See **BOUNTY**, 10.

NATIONAL ASYLUM FOR DISABLED VOLUNTEERS.

See **BOUNTY**, 4; **FORFEITURE**, 2.

NATIONAL BANKING ASSOCIATIONS.

1. It is not within the power of a State legislature to alter, modify, add to, or diminish the powers, duties, or liabilities created in or conferred upon banking associations established under a law of the United States. 56.
2. Such associations cannot be merged or in any manner identified with similar corporations created by State legislation, without the authority of Congress. *Ibid.*
3. The dissolution of a national banking association is not complete until the necessary action has been had for the redemption of its circulating notes, either by actually redeeming them and surrendering them to the Comptroller of the Currency, or by depositing an amount of Treasury notes with him adequate to their redemption. *Ibid.*
4. The obligations, duties, and liabilities of such association, before the completion of the acts necessary to its dissolution, stated. *Ibid.*
5. The remedies given by the national banking law for a violation of its provisions may be pursued by the Comptroller of the Currency. *Ibid.*
6. The United States have no priority over private creditors in the assets of an insolvent national bank for payment of deposits made in such bank to the respective credit of the United States Treasurer, of a United States disbursing-officer, and of the registry of a United States district court, after the fund which may be realized from the bonds held by the United States as a security for such deposits is exhausted. 528.

NATIONAL CEMETERIES.

1. Congress cannot acquire or assert exclusive jurisdiction over any part of the territory of a State without the consent of the State legislature; and hence, before such jurisdiction over a national cemetery can become vested in the United States, the consent of the legislature of the State in which the cemetery is situated must be obtained, notwithstanding the provision of section 6 of the act of February 22, 1867, chap. 61. 131.
2. But to authorize payment for land appropriated for the purpose of a national cemetery under that act, the consent of the legislature of the State in which the land lies is not necessary; nor, in such case, is the opinion of the Attorney-General as to the validity of the title required, though, as a prudential measure for the security of the Government, it would seem to be highly expedient to obtain his opinion. *Ibid.*

NATIONAL CEMETERIES—Continued.

3. Where compensation has been paid for land thus acquired for a national cemetery, without having obtained the consent of the State legislature to the acquisition, the proper course to be taken is for the Secretary of War to apply to such legislature for its consent. *Ibid.*

NATURALIZATION.

See **CITIZENSHIP**, 1, 4.

NAVAL PAYMASTERS IN CALIFORNIA.

See **COMPENSATION**, 11, 12, 13.

NAVAL-PENSION FUND.

1. Certain moneys having been paid into the Treasury to the credit of the naval-pension fund in pursuance of a final decree of a district court of the United States, and being thus no longer subject to the jurisdiction and control of the court: *Advised* that a subsequent decree of the court, directing a distribution of the same moneys as military salvage, should not be respected. 299.
2. Opinion of August 1, 1870, (*ante*, p. 299,) reconsidered upon additional matter submitted, and the conclusions arrived at in that opinion re-affirmed. 348.

NAVIGATION LAWS.

1. Where a steam-tug was owned by the Government and used by the War Department in towing dredging-machines and scows, and for other like purposes: *Held* that it was not subject to the inspection laws of the United States relating to steam-vessels, and that unlicensed pilots and engineers might lawfully be employed upon her. 248.
2. Public vessels, within the meaning of the inspection and navigation laws, are vessels owned by the United States and used by them for public purposes. *Ibid.*
3. Those laws do not warrant any distinction between public vessels under the control of the Navy Department and public vessels under the control of any other Department of the Government. *Ibid.*

NAVY.

1. The regulations adopted by the Secretary of the Navy, with the approbation of the President, on March 13, 1863, concerning the relative rank of the staff officers of the Navy in so far as they are alterations of the orders of the Secretary of the Navy to which legislative sanction was given by the acts of August 5, 1854, chap. 268, sec. 4, and March 3, 1859, chap. 76, sec. 2, are not founded upon valid authority of law. 9.
2. Those orders are not properly within the provision of the 5th section of the act of July 14, 1862, chap. 164, from which was drawn the supposed authority to alter or modify them, and establish new and different regulations on the subject to which they relate. 10.
3. The opinion of Attorney-General Bates (10 Opins., 413) dissented from. *Ibid.*

NAVY—Continued.

4. It appearing that the question proposed in the case of Rear-Admiral Goldsborough (viz., whether he has been fifty-five years in the naval service, and is therefore liable to be retired from active service under the 8th section of the act of July 16, 1862) was considered in the year 1867 by the then President and cabinet, including the Attorney-General, and decided by them; that the decision was adopted by the Secretary of the Navy, and has been acted upon up to the present time; that application was made for legislation to change the result announced; and that Congress has not evinced any dissatisfaction with such result, or an intention to modify it: *Advised* that the decision mentioned be followed as a rule already settled, without a new inquiry into the validity of the reasons upon which it is founded. 33.
5. By act of July 15, 1870, the allowance of funeral expenses of a naval officer who died in the United States is prohibited; but such expenses are allowable where the officer died in a foreign country, to an amount not exceeding his sea-pay for one month. 341.
6. The fact that the officer had started on a foreign service, but died in a port of the United States at which his vessel had touched, does not relieve the case from the prohibition of the statute. *Ibid.*
7. The proviso to section 9 of the amendatory act of March 2, 1867, "that no promotion shall be made to the grade of rear-admiral upon the retired list while there shall be in that grade the full number allowed by law," does not forbid the advancement to that grade on the retired list, under section 1 of the act of July 25, 1866, of any commodore who may have commanded a squadron by order of the Secretary of the Navy, or performed other highly meritorious service. 544.

See COMPENSATION, 11, 12, 13; DISMISSAL OF MILITARY OFFICERS, 2, 3; PRESIDENT, 1.

NEUTRALITY ACT.

1. Judicial proceedings should not be instituted by the United States, under the 3d section of the act of April 20, 1818, (3 Stat., 448,) against certain gun-boats building in New York for the Spanish government, and which, there is reason to believe, are to be employed by that government against Cuba. 177.
2. The provisions of that section examined, and shown to be inapplicable, in view of all the circumstances, to the case referred to. *Ibid.*
3. Proof that a vessel transported from Aspinwall to the coast of Cuba men, arms, and munitions of war, destined to aid the Cuban insurgents, is insufficient, by itself, to warrant proceedings against such vessel for violation of the neutrality law of the United States. 541.

OATH OF OFFICE.

1. The act of February 15, 1871, prescribing an oath of office to be taken by persons who participated in the late rebellion, was in-

OATH OF OFFICE—Continued.

tended to relieve those to whom it relates from the necessity of taking the oath required by the act of July 2, 1862, and in lieu thereof to require the modified oath prescribed by the act of July 11, 1868. 390.

2. The provisions of the act of July 2, 1862, having been taken by Congress to include mail-contractors, they are to be regarded as also included in the provisions of the act of February 15, 1871. *Ibid.*
3. Accordingly, mail-contractors who participated in the late rebellion, but are not disqualified from holding office by the fourteenth amendment of the Constitution, and who engage in the service of carrying the mail since the date of the act of February 15, 1871, should take the oath prescribed by the act of July 11, 1868. *Ibid.*
See **COMPENSATION**, 16; **RECONSTRUCTION LAWS**, 3, 4.

OBSTRUCTIONS TO NAVIGATION.

In view of the practical difficulties of preventing the obstructions to navigation mentioned in the case submitted by a resort to legal proceedings: *Advised* that the attention of the proper committee of Congress be called to the subject, and penal legislation recommended. 342.

OFFICERS OF CUSTOMS.

1. The port-wardens of the port of New York, appointed under the State laws, are not the officers meant by the words "proper officers of the port or district," found in the 52d section of the act of March 2, 1799. 244.
2. The officers there meant are the customs officers of the port or district, appointed pursuant to the laws of the United States. *Ibid.*
3. The act of July 27, 1866, (14 Stat., 302,) repealed the 5th section of the act of March 3, 1851, (9 Stat., 598,) so far as that section relates to the appraisers and assistant appraisers for the port of New York, but no further. 312.

See **COMPENSATION**, 6, 7, 14, 15, 17; **STORAGE**, 2.

OFFICERS OF INTERNAL REVENUE.

See **INTERNAL REVENUE**, 4, 9, 13, 14, 15, 16, 17, 18; **COMPENSATION**, 16.

OREGON CENTRAL RAILROAD COMPANY.

The grants made by the act of May 4, 1870, to the Oregon Central Railroad Company cannot be transferred by that company to another company; the above-named company being alone within the contemplation of Congress, in respect of the donations made and duties imposed by that act. 382.

PACIFIC RAILROADS.

1. The Central Pacific Railroad Company having accepted the conditions of the act of July 1, 1862, in compliance with the 9th section of that act, a refusal on the part of its directors or any of its officers charged with the management of the concerns of the company to provide suitable cars for the transportation over its road of

PACIFIC RAILROADS—Continued.

- troops and military supplies whenever requested to transport the same by any Department of the Government, or a refusal on their part to allow the Government a preference in the use of its road for such purpose, would work a forfeiture of its franchise, which might be declared and enforced by judicial proceedings instituted in behalf of the United States. 87.
2. The company ought not to be paid for the transportation of troops in box freight-cars, at passenger rates, but at such lower rates as are a suitable compensation for the inadequate accommodations furnished. *Ibid.*
 3. The main line of the Pacific Railroad, intended in the 11th section of the act of July 1, 1862, (12 Stat., 495,) commences at the one hundredth meridian of longitude west from Greenwich, and terminates at the eastern boundary of the State of California. 127.
 4. The provisions of the 5th section of the act of July 2, 1864, amendatory of section 6 of the act of July 1, 1862, requiring one-half of the compensation for services rendered for the Government by the Kansas Pacific Railway Company to be applied to the payment of the bonds issued by the United States in aid of the construction of the road of that company, include services performed on that portion of the road in respect of which no bonds were issued by the Government, as well as services performed on the particular portion of the road in respect of which bonds were issued thereby. 351.
 5. The acts of July 1, 1862, and July 2, 1864, contemplate the re-imbursement of the United States, by the Union Pacific Railroad Company, of the interest on the bonds issued as a subsidy to that company, as and when such interest is paid by the Government. 360.
 6. The Government may retain the entire amount of compensation for services rendered to it by the company, applying the same to the interest paid by the United States, unless such interest shall have been repaid by the company, and in that event one-half of the compensation for such services may be reserved and applied to the principal of the bonds. *Ibid.* (See Note, p. 369.)
 7. The provisions of the acts of July 1, 1862, and July 2, 1864, do not authorize the allowance of a subsidy in lands or bonds to the Central Branch Union Pacific Railroad Company, for the construction of a railroad from the present western terminus of its road (one hundred miles from the Missouri River) to the main trunk of the Union Pacific Railroad. 430.
 8. The head of a Department should not dispose of public lands or issue the bonds of the Government in aid of any enterprise, however meritorious, without an unequivocal direction from Congress. *Ibid.*

PASSPORTS.

1. Where application was made to the Department of State for passports for five persons residing in the island of Curaçoa, four of whom were born in that island, and one in the island of St. Thomas, and all of whom were children of native citizens of the United States, but it did not appear that any of the applicants had ever resided

PASSPORTS—Continued.

- or intended to reside in the United States: *Advised that the applicants are not entitled to passports.* 90.
2. *Sembler that the granting of passports is not obligatory in any case, but is only permitted where not prohibited by law. Ibid.*
See CITIZENSHIP, 6.

PATENT LAWS.

1. The 18th section of the act of July 4, 1836, as modified by the 1st section of the act of May 27, 1848, conferred a very large discretion upon the Commissioner of Patents in regard to patent extensions, and subjects connected therewith properly fall within the scope of his investigation upon applications for such extensions. 28.
2. The patent laws having made ample provision for revising the decisions of the Commissioner, in proper cases, by the judiciary, and the Executive having no appellate power over questions arising under them, parties should be left to pursue the mode of relief there provided. *Ibid.* (See Note, p. 29.)
3. Statutes relating to appeals from the Commissioner of Patents to the judges of the courts in the District of Columbia, reviewed. 79.
4. The provision of the 11th section of the act of March 3, 1839, requiring an appellant from the Commissioner to the judge to pay into the Patent-Office, to the credit of the "patent fund," the sum of twenty-five dollars, is not repealed by the 10th section of the act of March 2, 1861. *Ibid.*
5. Under the act of March 3, 1863, which abolished the circuit court of the District of Columbia, and established the supreme court of the District, the chief justice and associate justices of the latter court have the same right to hear and determine appeals from the Commissioner as the chief judge and assistant judges of the former court previously had. *Ibid.*
6. The allowance of twenty-five dollars authorized by the act of August 30, 1852, to be paid out of the "patent fund" to the judge hearing the appeal, is now, by virtue of the 7th section of the act of July 20, 1868, payable out of the appropriation for "miscellaneous and contingent expenses of the Patent-Office," under the direction of the Secretary of the Interior. *Ibid.* (See Note, p. 85.)
7. To be effectual, the certificate of the proceedings and decision of a justice of the supreme court of the District of Columbia in an appeal from the Commissioner of Patents, required to be given and returned by him to the Commissioner under the 11th section of the act of March 3, 1839, must be made and certified by the justice while he is in office; but, if so made and certified, it may be transmitted by him to the Commissioner after he has ceased to be a justice. 265. (See Note, p. 267.)

PENSIONS.

1. The widow of a naval officer who died at a navy-yard or station of a disease contracted while on duty there, is not entitled to a pension under the provision of section 2 of the act of July 27, 1868. 328.

PER DIEM FOR COURT-MARTIAL SERVICE.

See ARMY, 29.

POSTAL LAWS.

1. The act of March 3, 1871, (16 Stat., 571,) prohibits the printing of black lines, marks, or characters upon the envelopes furnished for the Post-Office Department, except the "return request." 466.
2. The Postmaster-General is not authorized to make any contracts for carrying the mail other than for "temporary service," except under or in pursuance of bids received, after inviting them by advertisement. 473.
3. Where the lowest bidder at an "annual letting" fails to enter into contract and perform service, the Postmaster-General cannot legally contract with the next lowest bidder who will agree to perform the service at his bid for the whole term, without re-advertising. *Ibid.*
4. After once advertising, and failing to secure a contractor, a contract cannot lawfully be made with a party who has not been a bidder, on a proposition informally submitted for the contract term. *Ibid.*
5. The word "temporary," as used in the 23d section of the act of July 2, 1836, should not be construed to authorize a discretionary contract for a term extending beyond the time when the next annual letting will take effect; except where the exigency arises too late in the contract year for the advertisement and letting to be completed before the beginning of the next year, in which case the right to make temporary contracts extends through the succeeding year. *Ibid.* (See Note, p. 477.)
6. The certified check or draft deposited by a bidder for the transportation of the mail, under the requirements of the 4th section of the act of March 3, 1871, where the contract is awarded to such bidder, should be returned as soon as he files an acceptable bond to faithfully perform his contract. 477.
7. But if the check or draft was deposited by a bidder whose proposal is not accepted, it should be returned as soon as the contract is awarded to another. *Ibid.* (See Note, p. 478.)
8. A check or draft drawn upon a national bank by a party offering proposals to transport the mails, to whom the bank has issued a letter of credit covering the amount of the check or draft, and deposited with the Postmaster-General accompanied by the letter, is a sufficient compliance, to the extent of such amount, with the requirement of section 4 of the act of March 3, 1871. 534. (See Note, p. 478.)
9. The Auditor of the Treasury for the Post-Office Department, with the written consent of the Postmaster-General, has the power under the 3d section of the act of March 3, 1851, to compromise, release, and discharge a claim for a penalty for the violation of the postal laws. 540. (See Note, same page.)
10. Section 14 of the act of March 3, 1845, gives the Postmaster-General exceptional authority to contract for steamboat service in certain

POSTAL LAWS—Continued.

cases, and under it he has the power to contract at once for that sort of service, without the advertisement and formalities prescribed in the case of general service. 565. (See Note, p. 566.)

See POST-OFFICE, 4.

POSTMASTER-GENERAL.

See CONTRACT, 8, 10; FRANKING PRIVILEGE, 1; POSTAL LAWS, 2, 3, 10.

POST-OFFICE.

1. Where letters addressed to a business firm which had ceased to exist, having reached their destination through the mail, were claimed by different parties, and some of the claimants, in order to ascertain their right in the premises, subsequently instituted a suit against the others in the local court, and obtained an order from the court enjoining the postmaster from delivering the letters in accordance with previous instructions of the Postmaster-General: *Advised* that the postmaster be directed to respect the order of the court by retaining the letters, and to deliver them to the parties who shall be finally determined by the court to be legally entitled thereto. 395.
2. Reconsideration of the case mentioned in opinion of March 25, 1871, (*ante*, p. 395,) upon additional information since received. 406.
3. It appearing that the order of the court, there referred to, not only enjoined the postmaster from delivering the letters in controversy to one of the contending parties, but commanded him "to refrain from withholding them" from the other party to the suit: *Advised*, further, that the postmaster be directed to disregard the latter branch of the said order. *Ibid.*
4. Where a letter was received by mail at a post-office, addressed to a young lady over eighteen but under twenty-one years of age, which is claimed by her and also by her guardian: *Advised* that the postmaster be directed to deliver it to the young lady, as this course would best meet the requirements of the postal laws. 481.
5. Any rights which the guardian has, by the laws of the State, over correspondence of the ward, can be exercised after the letter is delivered by the postmaster to the ward. *Ibid.*

PRESIDENT.

1. The President, by and with the advice and consent of the Senate, has power to advance a naval officer, in his own grade, not exceeding thirty numbers, for distinguished conduct in battle or extraordinary heroism. 1.
2. Where an officer of the Army has been reported to, and found unfit for the proper discharge of his duties by, the board of officers constituted under the provisions of the 11th section of the act of July 15, 1870, and, after having been allowed a hearing before the board, is recommended by the board to be mustered out of the service, it is the duty of the President to carry such recommendation into effect. 353.

PRESIDENT—Continued.

3. The fund appropriated by the act of March 3, 1871, for the expenses of the commission to settle claims of citizens of the United States against Spain, may be paid to the commissioners and advocate on the part of the United States, from time to time, at the discretion of the President. 415.
4. The act establishing the Department of Justice does not prohibit the designation by the President of an advocate on the part of the United States. 416.
5. The Executive has no authority to restore to the former owner certain lands in South Carolina which the United States hold under a title acquired by purchase of the premises at a tax-sale under the provisions of the direct-tax law. 506. (See Note, p. 507.)
See **APPOINTMENT**, 1, 3, 4, 5, 6; **ARMY**, 9, 10, 13, 14, 16; **DISMISSAL OF MILITARY OFFICERS**, 2; **PATENT LAWS**, 2; **TENURE OF OFFICE ACTS**, 3, 6, 7, 10.

PRIORITY OF UNITED STATES.

See **NATIONAL BANKING ASSOCIATIONS**, 6.

PROMOTION.

See **ARMY**, 1, 2, 3, 6, 7, 8, 21; **NAVY**, 7; **PRESIDENT**, 1.

PROOF OF STATUTES.

See **EVIDENCE**, 2, 3.

PROPERTY LOST IN THE MILITARY SERVICE.

See **CLAIMS**, 4, 5, 11, 14.

PROPOSALS FOR CONTRACTS.

See **DISTRICT OF COLUMBIA**, 3, 4.

PUGET SOUND AGRICULTURAL COMPANY.

1. The proviso to the appropriation made by the act of February 21, 1871, for paying to the British government the last installment of the amount awarded by the commissioners under the treaty of July 1, 1863, in satisfaction of the claims of the Puget Sound Agricultural Company, which requires all taxes legally assessed upon property of that company, covered by the award, to be satisfied, or the amount thereof to be withheld from the sum appropriated, is applicable only to such taxes as have been imposed by the laws of the United States. 503.
2. Accordingly, taxes assessed upon the property of the company by the authorities of Pierce County, Washington Territory, under the territorial laws, should not be so withheld. *Ibid.*

QUARTERMASTER'S DEPARTMENT.

See **ACCOUNTS AND ACCOUNTING OFFICERS**, 12; **ARMY**, 20; **CONTRACT**, 17, 19.

RECONSTRUCTION LAWS.

1. In September, 1868, J. W., a citizen of Texas, not in the military or naval service of the United States, while under indictment in a

RECONSTRUCTION LAWS—Continued.

court of that State, and under arrest to await trial therein for murder, was brought before a military commission at Austin, Texas, appointed by the commanding general of the fifth military district, under section 3 of the reconstruction act of March 2, 1867, chap. 153, and was there tried for the same murder, found guilty, and sentenced to be hanged : *Held* that, by virtue of the provisions of said act, and in view of the peculiar political relations then existing between the State of Texas and the United States, and of other circumstances presented in the case, the jurisdiction of the military commission was complete, and that there is no legal obstacle to the execution of the sentence. 59.

2. The constitutionality and validity of the provisions of the act of March 2, 1867, adverted to above, considered and affirmed. 60.
3. The oath prescribed by the act of July 2, 1862, and by the act of July 19, 1867, section 9, is not to be required of the officers of the State of Virginia, or members of the legislature elected under its new constitution, after Congress shall have approved the constitution and restored the State to its proper place in the Union. 135.
4. Before Congress has thus acted, the members of the legislature so elected may come together, organize, and do whatever is required by the acts of Congress as preliminary to the reconstruction of the State, without taking the oath referred to ; but they cannot, without violation of law, be allowed to transact any business or assume any other function of a legislature, if the oath has not been taken by them. *Ibid.*
5. The election of United States Senators by the legislature chosen under the new constitution of Virginia is a part of the action contemplated by Congress as preliminary to the restoration of the State to its full relation to the Government of the United States as one of the States of the Union. 149.
6. A new apportionment for the election of members of the legislature of Mississippi, different from the apportionment provided in the constitution framed by the State convention and designed to be submitted to the people for adoption, cannot be made by the military commander there ; nor can the article of that constitution, fixing the apportionment for members of the legislature, be separately submitted to the vote of the people. 156.

REFUNDING TAXES.

See INTERNAL REVENUE, 21, 29.

REGISTER OF WILLS FOR THE DISTRICT OF COLUMBIA.

See DISTRICT OF COLUMBIA, 2.

REGULATIONS.

See ARMY, 1, 2, 30; NAVY, 1, 2.

RE-INSTATEMENT IN OFFICE.

See ARMY, 13, 16; TENURE OF OFFICE ACTS, 3, 5, 7, 8, 9.

RELATIVE RANK OF ARMY PAYMASTERS.

See ARMY, 25, 26, 27, 28.

RELATIVE RANK OF STAFF-OFFICERS IN THE NAVY.

See **NAVY**, 1.

REMOVAL FROM OFFICE.

See **FOREIGN MISSION**, 1.

REMOVAL OF SUITS.

See **INTERNAL REVENUE**, 30.

RESIGNATION.

Where a paper addressed to the President, containing the resignation of a judge to take effect on a future day, was placed in the hands of a third party to be transmitted to the President, but before the day arrived the resignation was revoked : *Held* that the paper, though subsequently delivered to the President by the individual in whose hands it had been placed, had no effect as a resignation. 77.

RESTAMPING.

See **INTERNAL REVENUE**, 28, 29.

RETIRED LIST.

See **ARMY**, 13, 14, 16 ; **NAVY**, 4, 7.

ROCK ISLAND BRIDGE.

The War Department has no authority to proceed with the erection of any other bridge than the one "recommended by the Chief of Ordnance," referred to in the act of March 2, 1867; nor has Congress authorized an expenditure for the bridge of more than one million of dollars, irrespective of the amount to be refunded by the railroad company. 78.

SEAMEN'S WAGES.

See **CONTRACT**, 20.

SECRETARY OF THE INTERIOR.

See **BOND**; **EVIDENCE**, 1, 2.

SECRETARY OF THE NAVY.

See **COURT-MARTIAL**, 5.

SECRETARY OF THE TREASURY.

1. Under the provisions of the act of March 6, 1866, (14 Stat., 3,) it is for the Secretary of the Treasury to determine whether a cattle disease prevailing in a foreign country is such that, if neat cattle or the hides of neat cattle are imported from thence into the United States, the importations will tend to the introduction or spread of contagious or infectious diseases among the cattle here. 158.
2. Should the Secretary determine that such importation will have that tendency, he can revoke, in whole or in part, the suspension of the said act heretofore made by him. *Ibid.*
3. Under the joint resolution of June 21, 1870, the Secretary of the

SECRETARY OF THE TREASURY—Continued.

Treasury has power to enter into contracts for the recovery of real estate alleged to have been conveyed to the so-called Confederate States, but which is now in the occupancy of private individuals. 569.

4. In such contracts the Secretary may stipulate to allow as compensation for the service a portion of the proceeds realized from the property recovered. *Ibid.*

See **ADMINISTRATIVE LAW**, 4; **ALASKA**, 1, 2; **COLLECTION OF DUTIES**; **INDIANS**, 1, 2.

SECRETARY OF WAR.

See **ACCOUNTS AND ACCOUNTING OFFICERS**, 1, 7, 11, 12; **ALIENATION OF LAND OWNED BY THE UNITED STATES**; **ARMY**, 15; **COMPENSATION**, 19, 20; **CONTRACT**, 19; **DISTRICT OF COLUMBIA**, 6; **MILITARY BOOTY**; **MILITARY RESERVATION**, 1; **NATIONAL CEMETERIES**, 3; **ROCK ISLAND BRIDGE**; **TRANSMISSION OF CASES TO COURT OF CLAIMS**, 1.

SEIZURE.

1. Any unofficial person may seize property as forfeited to the United States, and the Government, if it chooses, may adopt the seizure and make it the basis of legal proceedings. 253.
2. If a revenue officer, whose official duty it is to make seizures of property for violation of the revenue laws, actually makes a seizure of merchandise while it is in his custody for the purpose of administering the customs laws, such officer is, nevertheless, to be regarded as the seizing officer. *Ibid.*

See **INTERNAL REVENUE**, 26.

SHIPPING ARTICLES.

See **CONTRACT**, 20, 21.

SPANISH CLAIMS COMMISSION.

See **PRESIDENT**, 3.

SPECIAL COUNSEL.

See **COMPENSATION**, 8, 19, 20.

STATUTES.

See **EVIDENCE**, 1, 2, 3; **INTERPRETATION OF STATUTES**, 1, 2; **PROOF OF STATUTES**.

STORAGE.

1. Under the 40th section of the act of July 18, 1866, moneys received by a collector of customs from the owners of private bonded warehouses, by way of re-imbursement to the Government for the compensation of the officers in charge of such warehouses, stand upon the footing of storage in all respects, and are subject to the same disposition as other receipts falling strictly within the designation of storage. 35.

STORAGE—Continued.

2. The collector may, accordingly, retain from moneys so received in any one year, as part of his official compensation, a sum not exceeding \$2,000; the excess over that amount being required to be paid into the Treasury. 36.
3. Section 40 of the act of July 18, 1866, in providing that "all moneys received by collectors for the custody of goods, wares, and merchandise in bonded warehouses shall be accounted for as storage under the provisions of the 5th section of the act of March 3, 1841," did no more than enact what was previously required by the regulations of the Treasury Department; and the provision is simply declaratory of the law as it existed at the date of its passage. 213.
4. As to moneys received from the proprietors of private bonded warehouses, the rule as to accountability is the same, whether such moneys are paid as half storage or for the attendance of a customs officer at the premises, and whether they were received before the date of the act of 1866 or after. *Ibid.*

SUBROGATION.

See CLAIMS, 5.

TAX ON OFFICERS' SALARIES.

1. A tax upon the salary of an officer, to be deducted from what would otherwise be payable as such salary, is a diminution of his compensation; and, in the case of the President and the judges of the Supreme and inferior courts of the United States, such diminution would fall within the prohibition of the Constitution, if the act levying the tax was enacted during the official term of the President or of the judge affected thereby. 161.
2. When Congress imposes a tax upon the salaries of all civil officers, the language, although general, must necessarily be construed to mean all civil officers except those whom Congress has not the constitutional power to subject to such a tax. *Ibid.*
3. Accordingly, the just construction of the internal-revenue laws, taxing "all salaries of officers," &c., does not require or permit any deduction of an income tax from the salaries of the President or the justices of the Supreme Court. *Ibid.*

TAX-SALES.

1. It is competent to the officer of internal revenue designated by the Secretary of the Treasury, under the 3d section of the joint resolution of March 26, 1867, to perform the duties of tax-commissioner in South Carolina, to enter upon and sell lands that may have been previously sold partly for cash and partly on credit by the tax-commissioners in that State, pursuant to the provisions of section 11 of the act of June 7, 1862, in cases where default in the deferred payments has been made by the purchasers of such lands. 559.
2. That officer can receive, at any time before entry and sale, the amount due on the deferred payments, including interest, and such payment will perfect the title of the purchaser so far as the Government is concerned. *Ibid.*

TAX-SALES—Continued.

3. The assignee of a certificate of sale issued by the tax-commissioner to a purchaser stands in the same situation as the latter, and upon payment by him of the amount in arrears, at any time prior to entry and sale by the aforesaid officer, becomes entitled to the property. *Ibid.*

See PRESIDENT, 5.

TENURE OF OFFICE ACTS.

1. The mere designation by the Postmaster-General of a special agent of the Post-Office Department to take charge of a post-office which at the time was held by a postmaster who had been appointed thereto by and with the advice and consent of the Senate, is not, either expressly or by just implication, a compliance with the terms and conditions upon which, by the provisions of the 2d section of the tenure of office act of March 2, 1867, the President was authorized to suspend an officer. 207.
2. Accordingly, where, after such designation of a special agent, a postmaster was able, ready, and willing to perform his official duties: *Held* that he was entitled to the compensation provided by law. *Ibid.*
3. Consistently with the spirit and purpose of the tenure of office acts of March 2, 1867, and April 5, 1869, the President may revoke the suspension of an officer and reinstate him in the functions of his office, after rejection by the Senate of a nomination to fill his place. 221.
4. The word *suspended*, as used in those acts, imports that the person suspended is still the incumbent of the office, and that the interruption of his performance of its duties is temporary and provisional. *Ibid.*
5. The effect of revoking the suspension is only to restore to his former condition the actual possessor of the office, to whose removal the Senate has given no advice or consent. *Ibid.*
6. Under the tenure of office acts (which, in the opinion expressed, are assumed to be applicable to foreign ministers and consuls, though this is regarded as doubtful upon authority, and perhaps upon principle also) the President may suspend the incumbent of a foreign mission until the end of the next session of the Senate, and designate some suitable person to perform the duties of the suspended officer in the mean time. 300.
7. Where an officer, during the recess of the Senate, was suspended, and another person designated to fill the office till the end of the next session of the Senate, who was afterward nominated for the office during such session, but the Senate adjourned without acting upon the nomination: *Held* that the failure of the Senate to confirm the nomination operated to restore the suspended officer; yet *held*, also, that the latter may be again suspended by the President for any causes which in his judgment are sufficient, without regard to the time when such causes began to exist. 301.

TENURE OF OFFICE ACTS—Continued.

8. A postmaster, having been commissioned for four years from April 20, 1867, was suspended by the President on the 5th of May, 1869, and another person designated to perform the duties of the office, who, at the ensuing session of the Senate, was nominated for the place, but was rejected by the Senate on the 5th of July, 1870, too late for the President to make another nomination at that session: *Held* that as the term of the suspension ended with the session of the Senate, without the removal of the suspended officer, or the appointment of a successor, by and with the advice and consent of the Senate, he thereby became reinstated in the office under his unexpired commission. 308.
9. A suspension, in its very nature, is temporary, and the necessary effect of a termination of the suspension is a reinstatement of the suspended officer, where the law has not otherwise provided. *Ibid.*
10. But an officer who has been suspended, and is afterward thus reinstated, may be again suspended by the President during the recess of the Senate. *Ibid.*
11. The suspension of the Commissioner of Internal Revenue under the tenure of office act of April 5, 1869, and the designation by the President of the First Deputy Commissioner of Internal Revenue to perform the duties of the suspended officer, did not vacate the office of First Deputy Commissioner; but the latter is entitled, as long as he performs the Commissioner's duties under the President's designation, to the salary of the Commissioner only. 512.

TRANSMISSION OF CASES TO COURT OF CLAIMS.

1. Where a claim against the United States for the value of property lost in the military service, filed under the provisions of the act of March 3, 1849, had been adjusted by the accounting officers of the Treasury, and the amount found due the claimant certified to the Secretary of War for the issue of a requisition for payment: *Held* that it was competent to the Secretary of War, if it should appear that this claim belonged to the class described in the 7th section of the act of June 25, 1868, to withhold his requisition, and cause the claim to be transmitted to the Court of Claims for adjudication, notwithstanding the amount found due thereon had been certified to him as aforesaid. 164.
2. Provisions of the acts of March 30, 1863, and June 25, 1868, compared. *Ibid.*
3. It should distinctly appear on the records or in the proceedings of a Department, when a claim is thus caused to be transmitted to the Court of Claims by the head of that Department, that disputed facts or controverted questions of law are involved in it, and that either the amount in controversy exceeds \$3,000, or (without regard to the amount involved in the particular case) that the decision will affect a class of cases, or furnish a precedent for the future action of the Department in the adjustment of a class of cases, or

TRANSMISSION OF CASES TO COURT OF CLAIMS—Continued.

that an authority, right, privilege, or exemption is claimed or denied under the Constitution; and, furthermore, what the facts disputed or questions of law controverted are. *Ibid.*

4. The head of a Department should also transmit to the court such a certificate as will show that the claim is one "of the character, amount, or class limited" in the said 7th section, that it may appear upon the face of the papers transmitted that the court has jurisdiction of the case. *Ibid.*

TRANSPORTATION OF TROOPS AND MILITARY SUPPLIES.

See CLAIMS, 12; CONTRACT, 2, 3, 4; PACIFIC RAILROADS, 1, 2.

TRAVELING ALLOWANCES.

See ALLOWANCES TO ARMY OFFICERS.

TREATIES.

1. The board of trustees of the Ottawa University, of which J. S. Emery was elected a member in January, 1869, and subsequently chosen president, was legally constituted under the provisions of the treaty with the Ottawa tribe of Indians of June 24, 1862. 336.
2. The words, "the said Ottawa Indians," used in the 6th article of that treaty, mean certain individual Indians therein named, and not the whole tribe in its tribal capacity. *Ibid.*
3. Under the Constitution, treaties as well as statutes are the law of the land; both the one and the other, when not inconsistent with the Constitution, standing upon the same level and being of equal force and validity; and, as in the case of all laws emanating from an equal authority, the earlier in date yields to the later. 354.
4. The 4th article of the treaty with the Kansas Indians, (12 Stat., 1112,) which provides for a sale of the lands therein mentioned in parcels not exceeding 160 acres each to the highest bidder for cash, evidently means that each parcel must be sold to the person making the highest bid for that particular parcel. 531.
5. A bid made upon condition that the whole of the lands shall be awarded to the bidder, there being higher bids from other parties for part of the lands, cannot properly be accepted with such condition; as, under the circumstances, this would be, in effect, a sale of the land in the aggregate and not in parcels, and would defeat the plain purpose of the treaty. *Ibid.*
6. The passenger-tax of two dollars per head levied in the year 1849 and subsequent years by the State of Panama, a province of the republic of New Granada, under authority from that republic, upon the captains of all vessels embarking or disembarking passengers in that State, was in substance and effect, so far as it affected citizens of the United States passing across the Isthmus of Panama, a violation of the 35th article of the treaty between the United States and New Granada of December 12, 1846, which provided that the right of way or transit across the said isthmus "should be open and free to the Government and citizens of the United States," &c. 547.

See CLAIMS AGAINST NEW GRANADA, 1; INDIANS, 2; INTERNATIONAL LAW, 1; LEGAL-TENDER NOTES.

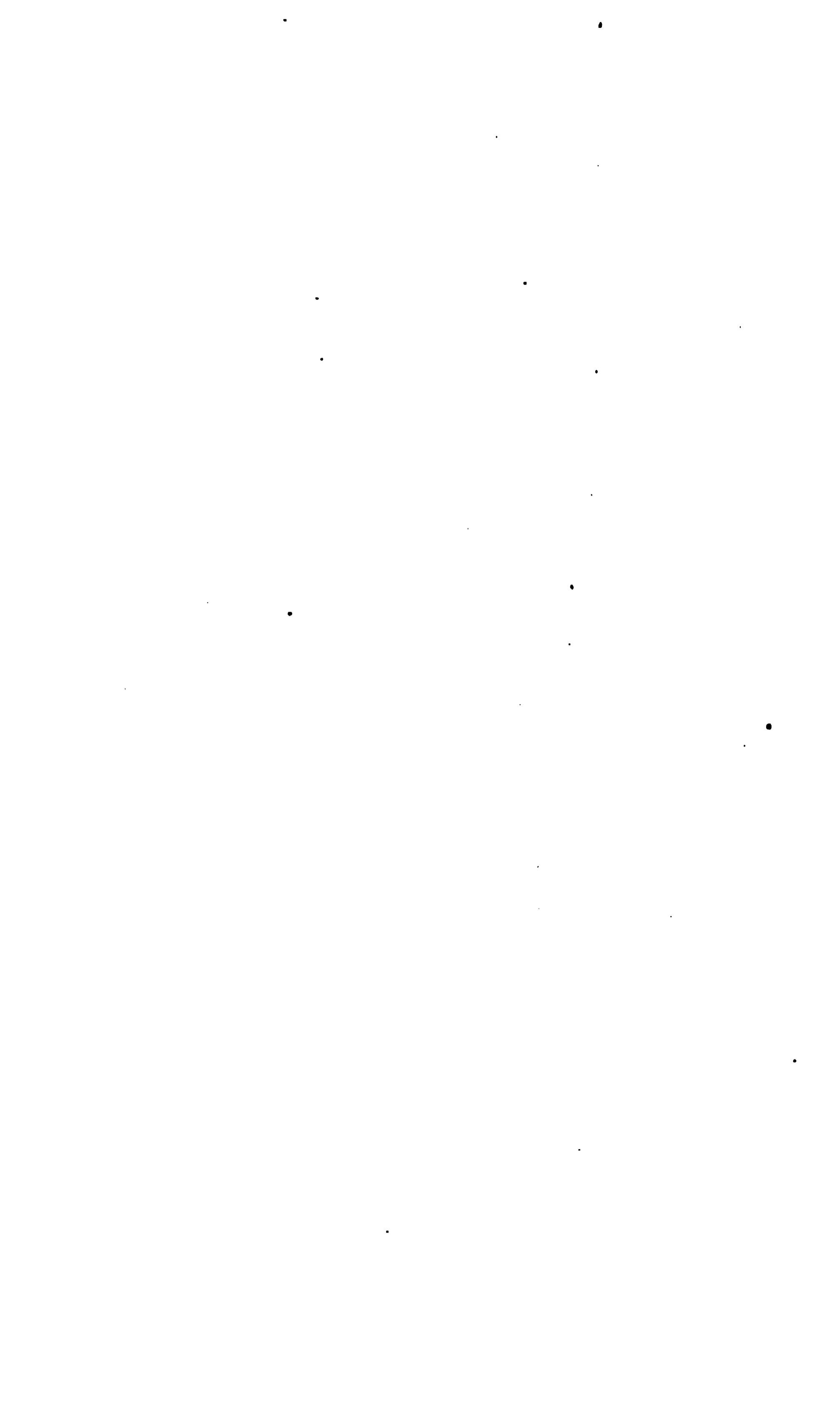
UNEXPENDED BALANCES OF APPROPRIATIONS.

1. The act of March 3, 1869, providing "for the completion of a custom-house, &c., at Knoxville, East Tennessee, *in addition to former appropriations, \$5,000,*" does not re-appropriate any of the unexpended balances of such former appropriations, which had previously been carried to the surplus fund under the requirements of law. 181.
2. Under the provisions of the act of July 12, 1870, balances of appropriations made for the year 1869-'70, of any description, may be applied to the service of the year 1870-'71, so far as, 1st, to pay in the latter year expenses properly incurred in the former year; and, 2d, to pay dues upon contracts properly made within the former year, though such contracts be not performed till within the latter year. 288.
3. Neither the 5th nor the 7th section of that act places any restriction upon the use of balances, 1st, where they are from appropriations not made in annual appropriation bills; 2d, where they are from appropriations not made especially for a particular fiscal year; 3d, where they are from appropriations known as permanent; and, 4th, where they are from appropriations known as indefinite. 289.
4. Claims allowed under the act of July 4, 1864, are not payable from appropriations made for the fiscal year 1870-'71, none of these appropriations seeming to be for that object. *Ibid.*
5. Appropriations which, in terms, are for the service of the year 1870-'71, cannot be used for any other purpose than the payment of the expenses incurred for the service of that year. *Ibid.*
6. Nor can money be taken, by counter requisitions, from such appropriations to settle old accounts. *Ibid.*
7. Permanent appropriations are those made for an unlimited period; indefinite appropriations are those in which no amount is named. *Ibid.*

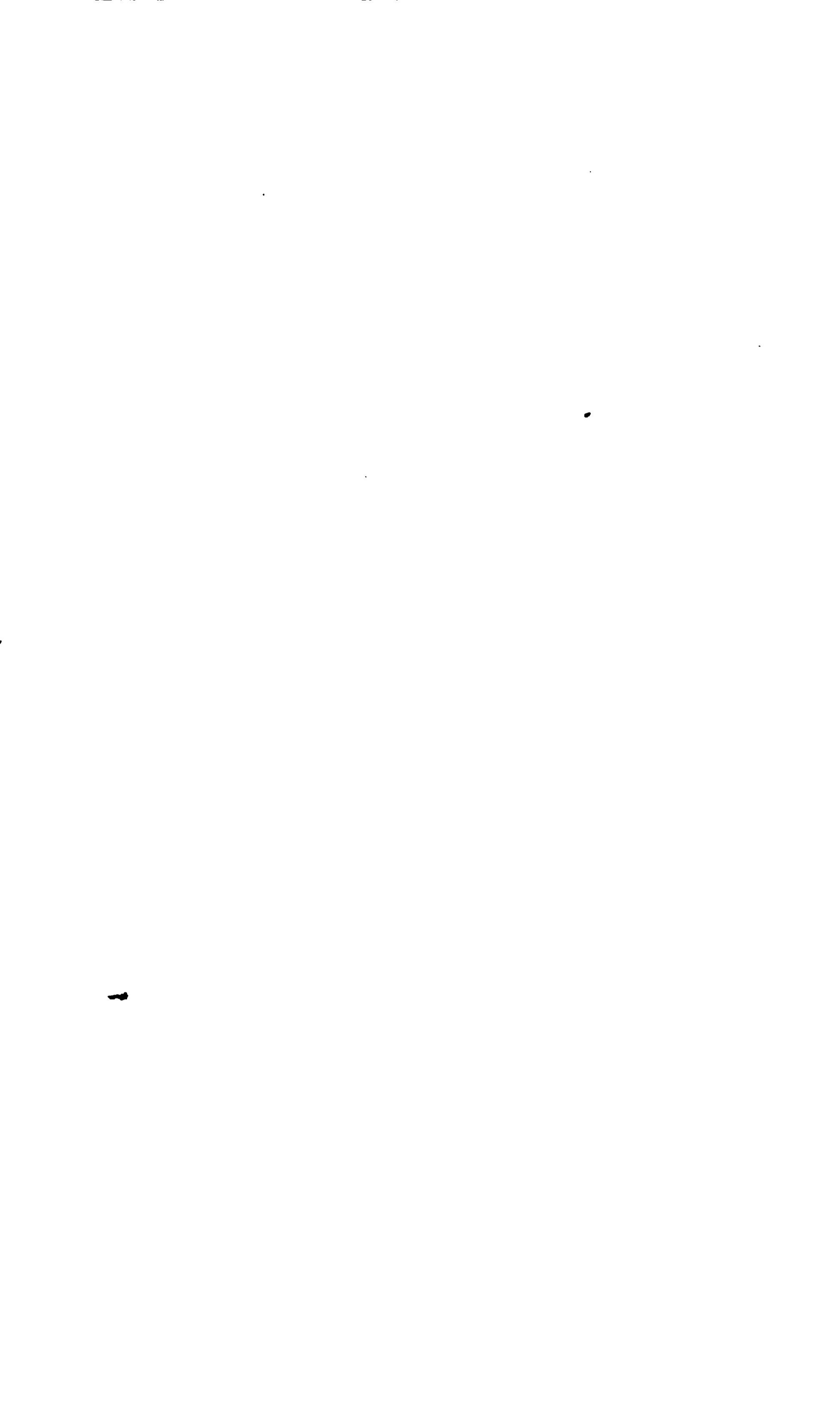
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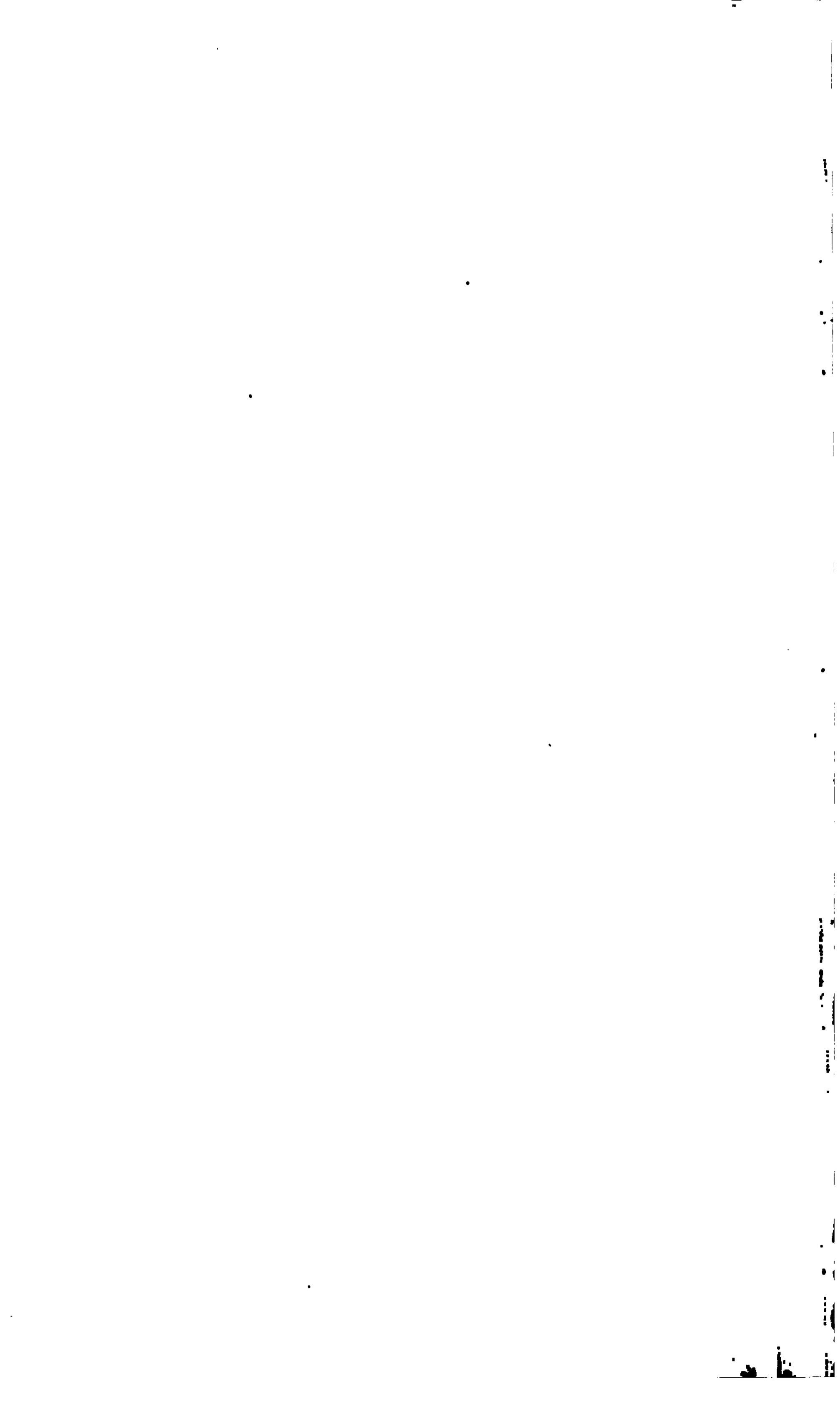
Under the organic act of the Territory of Utah, the territorial legislature has power to prescribe the mode of electing or appointing judges of probate in that Territory. 311.













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